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ALEXANDER L. STEVAS.

No.

**In the Supreme Court of the
United States**

Term,

ERNEST S. PATTON, Superintendent, SCI—
CAMP HILL, and HARVEY BARTLE, III,
Attorney General of the Commonwealth of
Pennsylvania,

Petitioners

v.

JON E. YOUNT,

Respondent

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

THOMAS F. MORGAN,
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County*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether pre-trial publicity of Respondent's retrial infringed on his ability to select and impanel a fair and impartial jury in light of the provisions of the Sixth Amendment to the Constitution of the United States.

2. Whether a federal court in reviewing a state court conviction by way of a habeas corpus petition may disregard the sworn testimony of jurors to remain impartial and find that the defendant was denied a fair trial on the basis that the jurors were biased by pre-trial publicity.

3. Whether the federal court of appeals improperly applied the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), as to juror prejudice to a state court conviction thereby violating the holding set forth in *Murphy v. Florida*, 421 U.S. 794 (1975).

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Authorities	iii
Citations to Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provision Involved	3
Statement of the Case	4
Reasons for Allowance of the Writ of Certiorari	8
Conclusion	12
APPENDIX:	
Opinion of the United States Court of Appeals for the Third Circuit	1a
Opinion of the United States District Court for the Western District of Pennsylvania .	54a
Order of the United States District Court for the Western District of Pennsylvania .	81a
Opinion of the Supreme Court of Pennsylvania	82a
Judgment of the United States Court of Appeals for the Third Circuit	100a
Order of the United States Court of Appeals for the Third Circuit Staying Issuance of Certified Judgment Until June 30, 1983	102a
Certificate of Service	103a

TABLE OF AUTHORITIES

PAGE

FEDERAL:

Dobbert v. Florida, 432 U.S. 282 (1977)	9
Irvin v. Dowd, 366 U.S. 717 (1961)	8, 9, 10
Marshall v. United States, 360 U.S. 310 (1959)	11, 12
Martin v. Warden, 653 F.2d 799 (3d Cir., 1981), cert. denied, 454 U.S. 1151 (1982)	9, 10, 11
Miranda v. State of Arizona, 384 U.S. 436 (1966)	4
Murphy v. Florida, 421 U.S. 794 (1975)	8, 9 10, 11, 12
Sumner v. Mata, 449 U.S. 539 (1981)	10
United States v. Provenzano, 620 F.2d 985 (3d Cir., 1980), cert. denied, 449 U.S. 899 (1980)	10
Yount v. Patton, 537 F. Supp. 873 (1982), vacated F.2d (1983)	9, 10, 11

STATE:

Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969), cert. denied, 397 U.S. 925 (1970)	5
Commonwealth v. Yount, 455 Pa. 303, 314 A.2d 242 (1974)	5, 6, 8, 9

STATUTE:

28 U.S.C. §2254	6, 10
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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit has not yet been reported. It is, however, set forth in the Appendix at 1a.

The opinion of the United States District Court for the Western District of Pennsylvania is reported at 537 F. Supp. 873 (W.D. Pa., 1982), and is set forth in the Appendix at 54a.

The opinion of the Supreme Court of Pennsylvania is reported at 455 Pa. 303, 314 A.2d 242 (1974), and is set forth in the Appendix at 82a.

STATEMENT OF JURISDICTION

On April 22, 1982, the United States District Court for the Western District of Pennsylvania denied Respondent's petition for a writ of habeas corpus with prejudice. Respondent appealed this order to the United States Court of Appeals for the Third Circuit which on May 10, 1983 vacated the judgment of the District Court and directed that the writ of habeas corpus should be granted unless the Commonwealth affords Yount with a new trial within a reasonable period of time. From such an order granting a new trial, the Petitioners now file a petition for writ of certiorari with this Court.

On May 25, 1983, pursuant to motion of the Petitioners herein and Rule 41(b) of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Third Circuit entered an order staying issuance of the certified judgment to June 30, 1983. It was further stated that if during the period of the stay it received notification from the Clerk of the Supreme Court that a petition for writ of certiorari had been filed, the stay would continue until final disposition by the Supreme Court.

The jurisdiction of the Supreme Court to review the decision of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision which is involved in the instant matter being the Sixth Amendment to the United States Constitution which provides:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, a senior at Dubois Area High School who resided near Luthersburg, Pennsylvania was found in a wooded area adjoining a red-dog road leading from her school bus stop to her rural home. The autopsy revealed that the cause of death was due to shock, loss of blood and strangulation due to an excess of blood in her lungs. Examination revealed numerous wounds about the girl's head caused by a blunt weapon, three slashes across her throat and cuts of the fingers on her left hand, caused by a sharp instrument. When found, the girl's body was not fully clothed, in that one stocking and one shoe had been removed and the stocking tied about her neck.

Respondent, Jon E. Yount, was arrested April 29, 1966, on charges of murder and rape filed to No. 2 May Sessions 1966 in the Court of Quarter Sessions of Clearfield County, Pennsylvania. The case proceeded to trial on September 28, 1966, and on October 7, 1966, the Respondent was pronounced guilty by jury verdict of murder of the first degree and rape. The jury further pronounced sentence as life imprisonment. Following the denial of post-trial motions, Respondent appealed from the judgment of sentence to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania reversed the conviction and ordered a new trial on the basis of *Miranda v. State of Arizona*, 384 U.S. 436 (1966), which had been decided in the

period of time between the date of Respondent's arrest and the date of trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969). The Commonwealth appealed the ruling of the Pennsylvania Supreme Court with certiorari having been denied at 397 U.S. 925 (1970).

Prior to retrial, hearings were held on or about June 4, 1970, July 29, 1970 and August 17, 1970 with regard to Respondent's pre-trial motions as to change of venue on the basis of inability to select a fair and impartial jury and suppression of confessions and evidence obtained therefrom. The Court by memorandum and order filed September 21, 1970 denied the change of venue request and indicated that it would be bound by the guidelines as to suppression of evidence as set forth by the Supreme Court of Pennsylvania in its opinion rendered in the instant case found at *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925 (1970).

Jury selection for the retrial commenced on November 4, 1970, with the actual trial beginning on November 17, 1970. A second petition for change of venue was filed on November 13, 1970, during jury selection for the instant case, but was denied by memorandum and order of the Court dated November 14, 1970. On November 20, 1970 the jury returned a verdict of guilty of murder of the first degree. The rape charge was not tried by the Commonwealth at retrial. After denial of post-trial motions, the Respondent was formally sentenced on March 26, 1973. The judgment of sentence was appealed to the Supreme Court of Pennsylvania. That Court by opinion found at *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d

242 (1974), affirmed the judgment of sentence finding that Respondent had not been denied his right to a fair and impartial jury.

The Respondent, pursuant to 28 U.S.C. §2254, filed a petition for writ of habeas corpus pro se with the United States District Court for the Western District of Pennsylvania on or about January 5, 1981. One issue within the habeas corpus petition dealt with whether Respondent had been able to select a fair and impartial jury. After counsel had been appointed to represent the Respondent and an answer had been filed, evidentiary hearings were held before the Honorable Robert C. Mitchell, United States Magistrate on November 3, 1981 and December 28, 1981 at which time both parties placed testimony on record with regard to the merits of the petition.

On February 12, 1982, the Honorable Robert C. Mitchell recommended that a writ of habeas corpus issue on the basis that the respondent, herein, could not have received a fair and impartial jury trial within Clearfield County. The Petitioners herein, filed objections to the magistrate's report and recommendations on February 19, 1982. After oral argument before the Honorable Donald E. Ziegler, United States District Judge, the petition for writ of habeas corpus was denied with prejudice by opinion and order dated April 22, 1982. The District Court expressly found that Yount had not been denied his right to select and impanel a fair and impartial jury within Clearfield County. On May 10, 1983, following the filing of an appeal and the presentation of oral argument, the United States Court of Appeals for the Third Circuit vacated the judgment of the District court and held

that a writ of habeas corpus should issue unless the Commonwealth affords Yount a new trial within a reasonable period of time. The reason for such being that Yount had been denied his right to a fair trial by an impartial jury. The Petitioners now file this petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The instant case presents to this Court a matter in which the United States Court of Appeals for the Third Circuit has rendered a decision on a federal question in conflict with that reached by the Supreme Court of Pennsylvania. Further, the Court of Appeals decision appears to be in conflict with the holding of this Court in *Murphy v. Florida*, 421 U.S. 794 (1975).

The Respondent herein, Jon E. Yount, was convicted in 1970, after retrial in the Court of Common Pleas of Clearfield County, Pennsylvania of the offense of murder of the first degree. Within his post-trial motions and appeal to the Supreme Court of Pennsylvania, Yount raised the issue that his Sixth Amendment right to select a fair and impartial jury had been infringed upon by the pre-trial publicity to which the venire had been exposed. The Supreme Court of Pennsylvania in applying the test established by this Court in *Irvin v. Dowd*, 366 U.S. 717 (1961), found that: "These findings (no excessive pre-trial publicity) fully supported by the record, do not sustain appellant's claim, and the Court properly denied appellant's motion for a change of venue predicated on this theory." *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974). The Court further stated, quoting *Irvin v. Dowd*, that: "Neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of

prejudice or a "pattern of deep and bitter prejudice" shown ... throughout the community' which would require a change of venue. *Irvin v. Dowd*, 366 U.S. 717, 725, 727, 81 S.Ct. 1639, 1644, 1645 [6 L.Ed. 2d 751] (1961)." *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974).

In 1981, some ten (10) years after his conviction, the Respondent began the instant writ of habeas corpus action seeking to challenge his conviction and the decision made by the Supreme Court of Pennsylvania. When reviewing on assertion as to pre-trial publicity and change of venue in a habeas corpus proceeding from a state conviction, the federal court's review narrows considerably. "A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial. (Emphasis added.) *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed. 2d 589 (1974). See also *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed. 2d 344 (1977)." *Martin v. Warden*, 653 F.2d 799, 805 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

The United States District Court for the Western District of Pennsylvania after oral argument and review of the record of both the trial court and the federal magistrate found that Yount had failed to establish "publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County, or that the coverage utterly corrupted the judicial process." *Yount v. Patton*, 537 F. Supp. 873,

877 (1982). The District Court further noted that under the teaching of *Sumner v. Mata*, 449 U.S. 539 (1981), the findings of a state court judge as to the impact of pre-trial publicity are to be held presumptively correct. See also 28 U.S.C. §2254(d).

The law seems well settled that, "Pre-trial publicity exposure will not automatically taint a juror." *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir., 1980), *cert. denied*, 449 U.S. 899 (1980). *Martin v. Warden*, 653 F.2d 799, 804 (3d Cir., 1981), *cert. denied*, 454 U.S. 1151 (1982). "Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based on the evidence presented at trial." *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir., 1980), *cert. denied*, 449 U.S. 899 (1980). See also *Irvin v. Dowd*, 366 U.S. 717, 723 (1961), *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

With regard to the instant case, the record of voir dire at the second trial indicates that of the twelve (12) jurors who actually served on the panel, which heard Yount's case, nine (9) were accepted for the jury by both the Commonwealth and the defense *without challenges of any form* being made. Each one of these nine persons indicated that they had no opinion as to Yount's guilt or innocence. Of the three (3) persons who were challenged, two (2) indicated they had no opinion whatsoever and the remaining one (1), although stating he had an opinion, indicated he would enter the jury box with an open mind and that his verdict would be based on the evidence presented

at trial. The voir dire fails to demonstrate the actual existence of such an opinion in the minds of any one of the jurors such as would evidence or bring about the partiality of the panel.

Regardless of the sworn testimony during voir dire, the United States Court of Appeals for the Third Circuit in finding contrary to the Supreme Court of Pennsylvania and the United States District Court for the Western District of Pennsylvania held that "... despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County." *Yount v. Patton*, Appendix at page 32a. The Court of Appeals, by its holding, is applying the standards originally set forth in *Marshall v. United States*, 360 U.S. 310 (1959). The *Marshall* standard clearly allows for a federal court to find that when persons learn from news sources information with a high potential for prejudice such persons may be presumed to be prejudiced despite their assurance that they could remain impartial. Under the federal system, the representations of the jury members at Yount's trial, even though under oath, may be set aside.

The *Marshall* standard, however, is wholly inapplicable to a state court proceeding. *Murphy v. Florida*, 421 U.S. 794, 798 (1975). *Martin v. Warden*, 653 F.2d 799, 804-805 (3d Cir., 1981), *cert. denied*, 454 U.S. 1151 (1982). Justice Marshall in *Murphy* stated: "In the face of so clear a statement, it cannot

*Reasons for Allowance of the
Writ of Certiorari*

be maintained that *Marshall* was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States.... We cannot agree that *Marshall* has any application beyond the federal courts." *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

The decision rendered by the United States Court of Appeals for the Third Circuit is therefore not only contrary to that previously reached by the Supreme Court of Pennsylvania and the United States District Court for the Western District of Pennsylvania but further is contrary to the holding of this Court in *Murphy v. Florida*, 421 U.S. 794 (1975). The evidence presented as to publicity about the instant case, although indicating that the case was indeed publicized, does not evidence that the publicity was so extreme as to cause actual prejudice or that the publicity utterly corrupted the judicial process such that a fair and impartial jury could not be impaneled. The sworn testimony of the jurors may not be disregarded.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
Thomas F. Morgan,
District Attorney of
Clearfield County
Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-5372

JON E. YOUNT, *Appellant*

v.

ERNEST S. PATTON, SUPERINTENDENT, SCI-CAMP
HILL, and HARVEY BARTLE III, ATTORNEY
GENERAL OF THE COMMONWEALTH OF PENN-
SYLVANIA, *Appellees*

*Appeal From the United States District Court for the
Western District of Pennsylvania - Pittsburgh*

D.C. Civil No. 81-234

Argued December 17, 1982

Before: HUNTER, GARTH, *Circuit Judges* and STERN,*
District Judge

*Opinion filed May 10, 1983***

George E. Schumacher (Argued)
Federal Public Defender
590 Centre City Tower
650 Smithfield Street
Pittsburgh, PA 15222
Attorney for Appellant

* Honorable Herbert J. Stern, United States District Judge
for the District of New Jersey, sitting by designation.

** Due to illness, Judge Garth separately filed his opinion
concurring in the judgment on June 10, 1983.

F. Cortez Bell, III (Argued)
Assistant District Attorney
Thomas F. Morgan
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Clearfield, PA 16830
Attorneys for Appellees

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. Petitioner Jon E. Yount was convicted in 1966 of first degree murder and rape in the Court of Oyer and Terminer and General Jail Delivery of Clearfield County, Pennsylvania. On direct appeal the Pennsylvania Supreme Court determined that petitioner had not received adequate warnings against self-incrimination. It reversed the judgment of sentence and granted a new trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925 (1970) ("Yount I"). After a retrial before the same court, petitioner was convicted of first degree murder and was again sentenced to life imprisonment. The Pennsylvania Supreme Court on direct appeal affirmed the judgment of sentence. *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974) ("Yount II").

2. In 1981 petitioner filed a petition for a writ of habeas corpus in United States District Court.¹ Petitioner alleged, *inter alia*, that his conviction had been obtained in violation of his fifth and fourteenth amendment privilege against self-incrimination and his sixth and four-

1. The petition was initially filed in the Middle District of Pennsylvania, but was transferred to the Western District of Pennsylvania pursuant to 28 U.S.C. §2241(d) (1976).

teenth amendment right to a fair trial by an impartial jury.² The federal magistrate concluded that petitioner's privilege against self-incrimination had not been violated, but recommended that the petition be granted because petitioner had been denied a fair and impartial jury. App. at 124a-41a. The district court agreed on the former issue, rejected the magistrate's recommendation on the latter issue, and denied the petition. *Yount v. Patton*, 537 F. Supp. 873 (W.D. Pa. 1982).

3. We agree with the district court that petitioner's privilege against self-incrimination was not infringed. We conclude, however, that the petitioner's right to trial by a fair and impartial jury was violated. We will therefore remand that portion of the case to the district court.

I. SELF-INCRIMINATION

A. Facts³

4. During the early evening of April 28, 1966, the body of Pamela Rimer, an 18-year old high school student, was found in a wooded area near her home in

2. None of petitioner's other allegations are before us. Petitioner does not appeal the district court's rejection of his challenges to the trial court's instructions on the degrees of homicide and on the murder weapon. See *Yount v. Patton*, 537 F. Supp. 873, 875 (W.D. Pa. 1982); app. at 134a. All other claims by petitioner, including his attack on the use of character evidence at trial, his allegation of a prejudicial charge by the court, and his claim of ineffective assistance of counsel, were deleted on petitioner's motion after the district court determined that the claims had not been presented to the courts of Pennsylvania for their initial consideration. See 537 F. Supp. at 874-75; see app. at 126a-27a, 154a.

3. The federal magistrate adopted the statement of the facts given in the opinion of the Pennsylvania Supreme Court in *Yount II*, 455 Pa. at 306-08, 314 A.2d at 244-45. App. at 128a. We too adopt that statement. In addition we on occasion cite directly to the record for certain details omitted in the supreme court's summary. Unless otherwise noted, those details are undisputed.

Luthersburg, Clearfield County. There were numerous wounds about her head, apparently caused by a blunt instrument. There were also cuts caused by a sharp instrument on her throat and neck. One of her stockings was knotted and tied around her neck. An autopsy showed that she had died of strangulation when blood from the throat and neck wounds was drawn into the lungs. Except for her stocking and shoe she remained fully clothed. The autopsy revealed no indication that she had been sexually assaulted.

5. Neighbors gave state police a description of a station wagon which they had seen at approximately the time and place at which the body was found. *E.g.*, Testimony of Trial beginning November 17, 1970, at 143-48 ("T.T."). Sometime after two o'clock on the morning of April 29, 1966, state policemen learned that petitioner, the victim's high school mathematics teacher, had on prior occasions been seen in a station wagon fitting that description. T.T. at 290-93; Transcript of Proceedings — August 17, 1970, at 17-18, 20-21 ("T.P.").

6. At approximately 5:45 that morning, petitioner voluntarily appeared at the State Police Substation in DuBois, Clearfield County. The occupants of the substation had participated in the investigation of the Rimer homicide, T.T. at 198-201, 203-05, 255-56, but had gone to sleep unaware of any link between the homicide and petitioner or his vehicle. T.T. at 275, 277; T.P. at 13, 20.⁴

4. Petitioner asserts that before he came to the substation, the state policemen there knew that he and his vehicle had been linked to the scene of the crime. Appellant's Brief at 33. The trial court found, however, that when petitioner appeared at the substation "there was no knowledge on the part of the Police [at the substation] that he 'was the one they were looking for.'" App. at 754a. The Pennsylvania Supreme Court stated that the state policemen who had discovered that petitioner's automobile fit the neighbors' description had been working entirely separately and in a different location. *Yount II*, 455 Pa. at 309-10, 314, 314 A.2d at 246, 248.

Petitioner rang the doorbell. A trooper awoke, opened the door and asked whether he could be of assistance. Petitioner stated, "I am the man you are looking for." The trooper asked petitioner to repeat what he had said, app. at 11a; T.T. at 250-51, and then asked whether petitioner was referring to "the incident in Luthersburg." Petitioner said yes. The trooper then asked petitioner to come in and be seated.

7. Leaving petitioner unattended, the trooper went to a back bedroom and roused a detective and a second trooper. The first trooper informed them that "there was a man in the front that said we are looking for him" in connection with the Luthersburg incident. See T.T. at 276; T.P. at 6. The first trooper then returned to the front office where petitioner had removed his coat, hat and gloves. The trooper asked petitioner for his identification. Petitioner gave the trooper his wallet, which the trooper returned after removing petitioner's automobile operator's license. T.T. at 252.

8. Shortly thereafter, the detective and the second trooper entered the front office. The detective was handed petitioner's license and learned that petitioner was Jon Yount. App. at 12a; T.T. at 259, 262-63, 271. The detective requested that petitioner be seated inside a smaller adjacent office, and gave petitioner something to eat. See *Yount I*, 435 Pa. at 278, 256 A.2d at 465; T.P. at 15. The detective asked, "Why are we looking for you?" Petitioner replied, "I killed that girl." Upon hearing that answer, the detective inquired, "What girl?", and petitioner responded, "Pamela Rimer."

9. The detective then asked, "How did you kill this girl?" Petitioner answered, "I struck her with a wrench and I choked her." At that time the detective undertook to advise petitioner of his rights. The detective, however, failed to tell petitioner of his right to court-appointed counsel if he could not afford his own attorney. The detective then conducted an interrogation regarding the

details of the crime. At some point the second trooper searched petitioner and confiscated his penknife. T.T. at 265-66, 267-68, 272-73.⁵ Petitioner gave his first written confession to the detective. Later the district attorney, after giving similarly inadequate warnings, questioned petitioner and obtained another written confession.

B. State Proceedings and Proceedings Below

10. Before the first trial petitioner moved to suppress his statements and confessions as violative of *Miranda v. Arizona*, 384 U.S. 436 (1966). After a hearing the motion was denied. The petitioner's statements and confessions were admitted in the first trial over petitioner's objections.

11. The Pennsylvania Supreme Court held that the warnings given by the detective and district attorney were inadequate under *Miranda*. *Yount I*, 435 Pa. at 279, 256 A.2d at 465 (Roberts, J., plurality opinion). The court rejected the Commonwealth's argument that the confessions were volunteered. "After indicating a willingness to talk, [petitioner] was *interrogated* about details of the crime, and his formal confession followed." 435 Pa. at 279-80, 256 A.2d at 465 (emphasis in original); see 435 Pa. at 281, 256 A.2d at 468 (Jones, C.J., concurring). The court found the confessions invalid and granted a new trial. 435 Pa. at 281, 256 A.2d at 466.

12. Prior to the second trial petitioner requested that his oral and written statements be suppressed. The trial court on the authority of *Yount I* suppressed the written confessions, as well as the question "How did

5. Petitioner argues that the state police searched him and confiscated his penknife *before* the detective asked, "Why are we looking for you?" Appellant's Brief at 32. Although there have been no explicit factual findings as to when the search occurred, petitioner's assertion has been implicitly rejected in the factual findings and holding of the state trial court and the district court, and is not fairly supported by the record.

you kill this girl?" and its answer. The trial court ruled, however, that petitioner's statement "I killed that girl" and his identification of "that girl" as "Pamela Rimer" were admissible under *Yount I*. App. at 748a, 755a. It concluded that petitioner's statements were made before petitioner was in custody. App. at 755a.

13. On appeal the Pennsylvania Supreme Court did not determine whether petitioner was in "custody" when he made the statements to the detective. *Yount II*, 455 Pa. at 311 n.4, 314 A.2d at 247 n.4. Instead it ruled that the statements were volunteered and not the product of interrogation. The court said that the detective's first question, "Why are we looking for you?", was simply an extemporaneous response "of neutral character." 455 Pa. at 310, 314 A.2d at 246. In the court's view the detective's question "What girl?" after petitioner had responded, "I killed that girl," was merely "a clarifying inquiry." *Id.* The supreme court therefore concluded that the questions were not calculated, expected or likely to elicit an incriminating response. 455 Pa. at 309, 314 A.2d at 246.

14. In his petition for a writ of habeas corpus, petitioner again argued that his fifth and fourteenth amendment privilege against self-incrimination had been violated by the admission of his responses to the detective's questions. The magistrate ruled that the responses were properly admitted because only after those responses, when "the police recognized that petitioner was present to confess his participation in a crime, did his presence become custodial." App. at 132a. The magistrate did not consider whether the questions constituted interrogation. The district court adopted the magistrate's findings. 537 F. Supp. at 875.

C. Discussion

15. *Miranda* held that unless the government has advised a defendant of his rights, it cannot put into evi-

dence statements stemming from the "custodial interrogation" of the defendant. 384 U.S. at 444. The Supreme Court defined "custodial interrogation" to mean

questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Id. (note omitted).

16. Petitioner argues on appeal that his statements "I killed that girl" and "Pamela Rimer" must be excluded as the products of custodial interrogation. He contends that the detective's questions constituted "interrogation," and asserts that the state policemen would not have allowed him to leave the substation when the questions were posed. We need not consider whether the questions "Why are we looking for you?" and "What girl?" constituted interrogation under *Miranda* because we conclude that petitioner was not in "custody" until after he had answered those questions. See *Beckwith v. United States*, 425 U.S. 341, 345-46 (1976); *United States v. Mesa*, 638 F.2d 582, 588 (3d Cir. 1980) (opinion of Seitz, C.J.).

17. To determine whether an individual is in custody, we use the "objective test of whether the 'government has in some meaningful way imposed restraints on [a person's] freedom of action.'" *Steigler v. Anderson*, 496 F.2d 793, 798 (3d Cir.) (quoting *United States v. Jaskiewicz*, 433 F.2d 415, 419 (3d Cir. 1970), cert. denied, 400 U.S. 1021 (1971)), cert. denied, 419 U.S. 1002 (1974). Where, as here, the individual has not been openly arrested when the statements are made,

something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart.

Id. at 799 (quoting *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970));

accord *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam); see *Mesa*, 638 F.2d at 587 n.4 (opinion of Seitz, C.J.). When the questioning occurs in a police station we must scrutinize the circumstances surrounding the statements with extreme care for any taint of psychological compulsion or intimidation. *Steigler*, 496 F.2d at 799.

18. In making our determination, we are mindful of the Supreme Court's caution that "custody" must not be read too broadly:

[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.

Mathiason, 429 U.S. at 495; accord *Steigler*, 496 F.2d at 799. In particular we note the Court's statement in *Miranda*:

There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statements he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

384 U.S. at 478 (note omitted).

19. Petitioner came voluntarily and on his own initiative to the substation. The state police did not know why he was there. The first trooper left petitioner unattended while petitioner on his own accord removed his outer clothing. The detective testified that before he posed the questions he would have returned petitioner's operator's license and allowed him to leave had petitioner so requested. T.P. at 15-16. On this record we have no difficulty in concluding that petitioner was not in custody when the detective asked, "Why are we looking for

you?" *Sullivan v. Alabama*, 666 F.2d 478, 482 (11th Cir. 1982); see *Mathiason*, 429 U.S. at 495; *Orozco v. Texas*, 394 U.S. 324, 325 (1969); *Barfield v. Alabama*, 552 F.2d 1114, 1118 (5th Cir. 1977). The admission of petitioner's response to that question therefore did not violate his fifth and fourteenth amendment privilege against self-incrimination.

20. Petitioner's response, "I killed that girl," was obviously highly incriminating. Although such an incriminating response undoubtedly heightened the detective's suspicion, it is police compulsion, and not the strength of police suspicions, which places a suspect in custody. See *Beckwith*, 425 U.S. at 346-47.

The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda* But this is simply one circumstance, to be weighed with all the others.

Steigler, 496 F.2d at 799-800 (quoting *Hall*, 421 F.2d at 545).

21. The detective testified that petitioner remained free to leave the substation when the detective asked, "What girl?" T.P. at 5. The detective explained that only after petitioner gave the name of the girl and how he had killed her could the detective determine that the petitioner was not merely seeking personal aggrandizement by confessing to a sensational crime in which he had no part. T.P. at 3-4. Petitioner, on the other hand, does not allege that the state police did "anything different" after he had stated, "I killed that girl." See Brief for Petitioner on Petition for Writ of Habeas Corpus at 19-20, 22-23 ("Brief for Petitioner"). Instead petitioner takes the position that he was in custody from the moment he identified himself, and that "either all the statements were voluntary or all were involuntary." *Id.* at 19; see Appellant's Brief at 33. In addition, we can find no evidence that the

detective at that juncture used any additional "force or intimidation, physical or psychological, actual or implied," *Government of Virgin Islands v. Berne*, 412 F.2d 1055, 1060 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).

22. Both the state trial court and the federal magistrate concluded that petitioner was not in custody until he responded, "Pamela Rimer." The district court agreed. After examining the peculiar factual circumstances of this case we cannot conclude that the district court erred. We therefore hold that petitioner's privilege against self-incrimination was not violated by the admission of his statements "I killed that girl" and "Pamela Rimer."

II. FAIR AND IMPARTIAL JURY

A. Facts and State Proceedings

23. Clearfield County is a rural county with a population of approximately seventy thousand served by two newspapers with a total circulation of approximately twenty-five thousand. On April 29, 1966, each of the newspapers devoted its front page to the Rimer homicide and to petitioner's appearance at the substation. Both newspapers gave front-page coverage to the pre-trial proceedings, the voir dire of 104 veniremen, and the nine-day trial. In the *Dubois Courier Express* the publicity culminated in seventeen consecutive editions each bearing banner headlines and carrying at least two feature articles. The *Clearfield Progress* gave the case similarly intense coverage. As the papers related, public interest in the proceedings was unprecedented; *The Progress* later adjudged petitioner's trial the top news item of 1966.⁶

24. The coverage was as detailed as it was extensive, *see app.* at 135a, 136a. The newspapers related in

6. The case also received publicity in radio and television broadcasts, as well as in out-of-state and national publications.

full petitioner's detailed written confessions as well as his testimony at trial retelling the homicide. They also detailed petitioner's defense of temporary insanity, the charge and evidence of rape, and finally petitioner's conviction on October 7, 1966, of both rape and first-degree murder.

25. Petitioner's cause continued to receive front-page coverage at every step of his appeal. Banner headlines announced the reversal of the conviction in *Yount I*. The dissent was reprinted in full, and a local radio program became a forum in which callers expressed their hostility to petitioner. As the second trial approached, newspaper coverage increased. The selection of each juror merited an article and often a profile. By the close of voir dire the two newspapers had printed sixty-six front-page articles on the appeal and retrial.⁷

26. Petitioner was returned to Clearfield for retrial before the same judge. On May 5, 1970, petitioner requested a change of venue. He claimed that the publicity which had saturated the county since the murder, and the continuing discussion of the case among residents, made a fair trial in Clearfield County impossible. In particular, petitioner alleged that the dissemination of prejudicial information outside of evidence was so widespread that it could not be eradicated from the minds of potential jurors. The prosecution argued in response that the case had received so much publicity across the state that it would be useless to change the venue. The trial court found that after the initiation of the appeal the newspapers had merely publicized the actions of the courts "without editorial comment of any kind." App. at

7. Petitioner's second trial and his subsequent efforts to gain retrial or parole also received front-page coverage. Those efforts have provoked substantial community protest in Clearfield County. App. at 137a & n.16. The magistrate found that even "at this late date, fifteen years after the crime, there is considerable public feeling in Clearfield County in opposition to the petitioner." App. at 136a-37a.

748a-49a. It denied the petition for change of venue on September 12, 1970.

27. Jury selection began on November 4, 1970, and took ten days, seven jury panels, 292 veniremen and 1186 pages of testimony. One hundred and twenty-five of the 292 veniremen were excused because they had not been chosen properly. Four others were dismissed for cause before they were questioned on the case. Of the 163 remaining veniremen who were questioned, all but two had read of the case in the newspapers, had heard about it on radio or television, or were otherwise familiar with it. *See app. at 135a, 137a.* When asked whether they had discussed the case, had heard it discussed, or had heard others express their opinion as to petitioner's guilt or innocence, over ninety percent said that they had. *See app. at 135a, 137a.*⁸

28. Of the 163 veniremen questioned on the case, 121 were dismissed for cause.⁹ Ninety-six of those 121 veniremen were successfully challenged after they testified that they had firm and fixed opinions¹⁰ which could not be changed regardless of what evidence was presented. *See app. at 135a & n.13.*¹¹ An additional 21 of the 121 veniremen were dismissed for cause after they said that they had an opinion which they could change only if

8. Ninety-six veniremen were asked, and 88 responded affirmatively.

9. Petitioner made 114 successful challenges, the prosecution seven.

10. After objection by respondent, petitioner was not permitted to ask each venireman what his opinion was. *See Transcript of Trial — Voir Dire at 86; Brief for Appellee at 13; Brief for Petitioner at 27-28.* Many veniremen nonetheless volunteered that they thought petitioner was guilty because he had confessed to the crime or because he had been convicted in the first trial. Other veniremen remembered hearing members of the public express the opinion that petitioner was guilty. No venireman said he thought petitioner was not guilty.

11. Petitioner challenged 90 of those 96 veniremen. The prosecution challenged the remaining six.

the petitioner could convince them to do so. *See app. at 135a-36a & nn. 14, 15.*¹² Thus 117 out of the 163 veniremen questioned were successfully challenged for cause after they said they could not set their opinion aside before entering the jury box.

29. There were also nine other veniremen, unsuccessfully challenged for cause by petitioner, who indicated that they had an opinion which they could change only if the petitioner could convince them to do so.¹³ When we combine those nine with the 117 veniremen dismissed for cause, we find that a total of 126 out of the 163 veniremen questioned on the case were willing to admit on voir dire that they would carry their opinion into the jury box.¹⁴

30. Voir dire gave other indications of the depth of community sentiment. One venireman, the wife of a minister, testified that she had heard too many opinions to be sure of her own. She was then asked:

Q. Would your presence in serving as a juror create a difficulty in your parish?

A. Why yes — when people heard my name was on for this — countless people of the church have come to me and said they hoped I would take — the stand I would take in case I was called. I have had a prejudice built up from the people in the church.

12. Petitioner successfully challenged all 21 veniremen.

13. Petitioner peremptorily challenged six of those nine veniremen, one was seated as a juror, and the remaining two were seated as alternates after petitioner had exhausted his peremptory challenges.

14. In addition, we note that twelve other veniremen stated that they had had an opinion at one time but claimed they would not carry it into the jury box. One of the twelve veniremen was dismissed for cause, six were peremptorily challenged by petitioner, and five were seated as jurors.

Q. Is this prejudice, has it been adverse to Mr. Yount?

A. Yes it was. They all say he had a fair trial and he got a fair sentence. He's lucky he didn't get the chair.

...

[T]he church people — I haven't asked for any of this but they discuss it in every group — but they say now since you are chosen and you will be there we expect you to follow through.

Q. Notwithstanding what the court would tell you, you feel you would be subject to the retributions or retaliation of these people —

A. I think I would hear about it.

App. at 410a, 412a. Another prospective juror said that his opinion had been erased by the passage of time, but his daughter-in-law later testified that he had left for jury duty voicing great animosity toward petitioner. App. at 430a, 527a-28a.

31. After the first jury panel was exhausted, petitioner again moved for a change of venue. Although more than three quarters of the veniremen already questioned had admitted that they would carry an opinion into the jury box, the court orally denied the motion. On November 14, 1970, the trial court rejected petitioner's written motion for a change of venue. In its memorandum opinion, the trial court explained that the still-incomplete voir dire had taken so much time and covered so many veniremen because the court had been lenient in permitting extended examination of prospective jurors and in granting challenges for cause. App. at 194a-95a. It said that "almost all, if not all, jurors seated had no prior or present fixed opinions." App. at 196a. The court noted

that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there

has been little, if any, talk in public concerning the trial from that time to the time when it was announced that a trial date had been fixed.

Id. The trial judge found the publicity was not unfair to the petitioner. App. at 197a. He added that few spectators had attended voir dire, which he took as some indication "particularly in a community as small as ours" that the publicity had not had a great effect. *Id.*

32. In fact the publicity had reached all but one of the twelve jurors and two alternates finally empanelled.¹⁵ Juror No. 1 said that he had read about the case and heard others express their opinions, but had never come to a "true" opinion. App. at 202a-04a, 207a. Juror No. 2 testified that he had recently discussed the case with others and had formed an opinion which was not firm and fixed and could be set aside. App. at 212a-15a, 218a-19a. The next of the jurors to be selected, Juror No. 4,¹⁶ had recently moved into Clearfield County and had never heard about the case. App. at 246a-52a. Juror No. 5 said that she "remembered that they had said he was guilty before" and wondered why petitioner was getting a new trial, but had no opinion and would try to forget what she knew. App. at 259a-63a.

33. Juror No. 6, James F. Hrin, testified that he had an opinion. He was then asked:

Q. Would you be able to change your mind regarding your opinion before becoming a juror in this

15. Juror No. 1 stated that "it was pretty hard to be here in Clearfield County and not read something in the paper." App. at 202a. Juror No. 2 said that "[y]ou could hardly miss it" on the radio and television news. App. at 212a. Juror No. 6 volunteered that "[i]t's rather difficult to live in DuBois and get the paper and find out what the people are talking about — at least the local people without having some opinion or at least reserving some opinion." App. at 275a-76a. Several potential jurors gave similar appraisals of the publicity's effect.

16. The venireman initially selected as Juror No. 3 was later excused for personal reasons.

case. That's the way I must have you answer the question.

A. If the facts were so presented I definitely could change my mind.

Q. Would you say you could enter the jury box presuming him to be innocent?

A. It would be rather difficult for me to answer.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the Judge?

A. That I could do.

...

Q. Did I understand Mr. Hrin you would require some — you would require evidence or something before you could change your opinion you now have?

A. Definitely. If the facts show a difference from what I had originally had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind — is that your position?

A. Well — I have nothing else to go on.

App. at 271a-73a. After repeatedly reiterating that he would need evidence to change his opinion, Juror Hrin said, "I don't know if that's the answer you want." App. at 275a. Finally when asked yet again whether he could set his opinion aside, he replied, "I have to." App. at 276a. The court denied petitioner's challenge for cause, app. at 274a-75a, and petitioner did not exercise a peremptory challenge.

34. Juror No. 7 said that he had formed an opinion but added that he was not sure that he still had an opinion or that he could forget what he knew. App. at 285a-88a, 298a-99a. Juror No. 8 had heard others discussing the case and had had an opinion. App. at 304a-05a. She testified that she had none at present except "what he said himself — that he was guilty." App. at 309a-10a. She then said that she did not think she would consider in deliberations what she already knew. App. at 312a-13a. Juror No. 9 said that she had thought petitioner was guilty and wondered why a new trial was necessary, but added that now she would have to hear both sides before she could decide. App. at 322a-24a. Juror No. 10 had heard the opinions of others and had expressed his own. He admitted that it would be difficult to strike what he'd heard before, but stated that he felt petitioner should "have every opportunity to prove his innocence." App. at 336a, 338a-39a. Juror No. 11 testified that he had read about the case but had not formed an opinion. App. at 347a, 349a, 357a.¹⁷

35. After petitioner had exhausted his peremptory challenges, two jurors and two alternates were seated over his challenges for cause. Both Juror No. 12 and replacement Juror No. 3 testified that they had heard about the case but had no opinion. App. at 362a-65a, 224a-28a. Alternate No. 1 stated that he had expressed an opinion which remained firm and fixed and which he would not put out of his mind until evidence was presented. App. at 380a-85a. Alternate No. 2 said that she had a definite opinion which she could not dismiss and which only evidence could change. App. at 395a-97a.

17. Petitioner did not challenge Jurors Nos. 1, 2, 4, 5, and 7-11. At the hearing on the habeas petition, petitioner explained that, because he had believed that a change of venue would not be granted and that a fair and impartial jury was impossible in Clearfield County, he had felt the jurors were "probably about as good as we are going to get." App. at 557a-58a; see Appellant's Brief at 16-17.

Both alternates were sequestered with the jury; the jurors were told that they were free to discuss the case with other jurors when sequestered.

36. The trial lasted for four days. The prosecution presented quite a different case than it had at the first trial. Because of the Pennsylvania Supreme Court's holding in *Yount I*, the Commonwealth was unable to put into evidence petitioner's detailed written confessions. As a result, it chose not to retry petitioner on the rape charge. See 537 F. Supp. at 877.

37. The change in the defense was even more marked. Petitioner did not take the stand to retell and explain the events revealed in the now-excluded confessions. He did not renew his claim of temporary insanity. Instead petitioner relied solely upon cross-examination and character witnesses.

38. After he was again sentenced to life imprisonment, petitioner filed a post-conviction motion for a new trial on November 27, 1970. He claimed, *inter alia*, that the trial court erred in rejecting several of his challenges for cause and in denying his petitions for a change of venue. The trial court rejected those arguments and dismissed the motion on January 15, 1973. It stated that there had been "practically no publicity" during the four years between trial and retrial, and "practically no public interest" shown at the second trial as few had attended on some days. App. at 751a. Voir dire had taken such a long time, it explained, because petitioner "raised so many questions and the court exercised its discretion to assure that there could be no complaint about the final jury empanelled." *Id.*

39. The Pennsylvania Supreme Court adopted the trial court's post-conviction findings and affirmed the judgment of sentence on January 24, 1974. *Yount II*, 455 Pa. at 311-12, 314 A.2d at 247. It ruled that the petitions for a change of venue were directed to the sound discretion of the trial court, and found no abuse of that

discretion because "the record fails to disclose undue community prejudice." *Id.*, 455 Pa. at 312-14, 314 A.2d at 247-48.

B. *Proceedings Below*

40. In his petition for a writ of habeas corpus, petitioner claimed that his conviction was obtained in violation of his right to a fair, impartial, and "indifferent" jury. In particular, he alleged that the trial court erred by refusing his motions for a change of venue.¹⁸

41. After two days of evidentiary hearings, the United States Magistrate recommended that the petition be granted. He noted that the case involved a sensational homicide in a small rural community and that extensive publicity had surrounded both trials. App. at 136a, 141a. He found "a strong community hostility toward the petitioner" as well as "pervasive community knowledge of the facts of the case." *Id.* at 141a. He characterized this case as one where

the public has been fully informed of the fact that the charged defendant had confessed to the crime, and that he had been previously tried and convicted of both rape and murder, and where on retrial the confession is suppressed but the public remains very much aware of the circumstances surrounding

18. Brief for Petitioner at 25-34. Petitioner also assigned error to the denial of the challenges for cause he made to Juror No. 3, Juror No. 12, and four potential jurors. App. at 16a; Brief for Petitioner at 34-39. The district court found no constitutional infirmity. 537 F. Supp. at 882-83. Petitioner does not raise those challenges on appeal.

Petitioner does argue on appeal that the trial court erred in denying his challenges for cause to Juror Hrin and both alternate jurors. Appellant's Brief at 25. Our disposition of this appeal makes it unnecessary to consider whether those arguments are properly before us.

the case and has formed definite opinions as to the guilt or innocence of the defendant.

Id. The magistrate calculated that over 70 percent of the veniremen and several of the jurors had testified that they had a fixed opinion, and stated that "a certain pall is cast upon those in the minority who testified that they had not formed a fixed opinion and could judge the case on its merits." *Id.* at 140a-41a. In his view, the empanelled jury was incapable of deciding the case solely on the evidence before it "but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." *Id.* at 141a. The magistrate concluded that petitioner could not have received a fair trial by an impartial jury in Clearfield County.

42. The district court rejected the recommendation of the magistrate. Although the court recognized the community's "substantial knowledge" of the case, it decided after an independent review of the record that the publicity had not been vicious or excessive. 537 F. Supp. at 877. It noted that the trial court had granted extensive latitude in the voir dire and stated that the exhaustion of the first panel of veniremen was not remarkable. *Id.* at 877, 882. The district court in its independent review also determined that all the jurors at some point said they could set aside their opinions. *Id.* at 877-82. Throughout it emphasized that the factual findings of the state court judge were presumptively correct under 28 U.S.C. §2254(d) (1976). The district court concluded that petitioner had failed to carry his burden of establishing that actual prejudice had rendered a fair trial impossible.

C. Discussion

43. Petitioner argues on appeal that the exposure of the venire to prejudicial pretrial publicity, and the refus-

al to grant a change of venue, violated his sixth amendment rights.¹⁹ The sixth amendment guarantees to the accused the right to be tried "by an impartial jury." U.S. Const. amend. VI. Under the due process clause of the fourteenth amendment, the states are required to effectuate that right by giving "a fair trial to the accused by a panel of impartial, 'indifferent' jurors," *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); accord *Murphy v. Florida*, 421 U.S. 794, 799 (1975), "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); see *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966).

44. To satisfy that constitutional standard the jurors need not be totally ignorant of the facts of a case. *Murphy*, 421 U.S. at 799-800. A juror who has read about the case, even one who has conceived some notion as to the guilt or innocence of the accused, may nonetheless serve "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 799 (quoting *Irvin*, 366 U.S. at 723); see *Martin v. Warden*, 653 F.2d 799, 804, 806 (3d Cir. 1981), cert. denied, 454 U.S. 1151 (1982). At the same time, a juror's assurance that he can enter the jury

19. Petitioner in his brief separates his challenge based on pretrial publicity from his challenge based on the refusal to change venue. We consider the arguments to be inseparable. See *Martin v. Warden*, 653 F.2d 799, 802-06 (3d Cir. 1981), cert. denied, 454 U.S. 1151 (1982). The pretrial publicity and its effects were the basis for petitioner's motions for a change of venue. Our inquiry in this habeas corpus proceeding is restricted to whether the refusal to change venue amounted to a violation of petitioner's constitutional rights. *Id.* at 804; see *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963). There could be no constitutional violation unless petitioner was denied his constitutional right to an impartial jury because of pretrial publicity. *Beck v. Washington*, 369 U.S. 541, 556 (1962).

box without an opinion is not dispositive if the accused can demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Murphy*, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723); see *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir.), cert. denied, 449 U.S. 899 (1980).

45. The petitioner challenging his state court conviction in a habeas corpus proceeding must shoulder a particularly heavy burden. Unlike a defendant seeking review of his federal conviction, the petitioner cannot argue that simply because his jury has read of extra-record facts with a high potential for prejudice, a federal court must presume that the jury was prejudiced. Cf. *Marshall v. United States*, 360 U.S. 310, 313 (1959) (per curiam) (federal conviction reversed under supervisory power). A federal court reviewing a state conviction on habeas corpus may presume prejudice only in extraordinary cases where "the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings." *Murphy*, 421 U.S. at 798-99; see, e.g., *Sheppard*, 384 U.S. 333 (extremely inflammatory publicity and a courthouse given over to carnival); *Estes v. Texas*, 381 U.S. 532 (1965) (trial in circus atmosphere); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (twenty-minute confession repeatedly broadcast on television). The publicity in this case, though it had a high potential for prejudice, did not utterly corrupt the trial atmosphere in that fashion. See *Murphy*, 421 U.S. at 798; *Martin*, 653 F.2d at 805. Petitioner must therefore show "that the publicity has been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible." *Martin*, 653 F.2d at 805 (emphasis added); see *Murphy*, 421 U.S. at 797-799; *Estes*, 381 U.S. at 542-44; *Martin*, 653 F.2d at 804-06; *United States ex rel. Greene*

v. New Jersey, 519 F.2d 1356, 1357 (3d Cir. 1975) (per curiam).²⁰

46. To determine whether actual prejudice has been shown, we must examine the "totality of circumstances" for any indication that petitioner's trial was not fundamentally fair. *Dobbert v. Florida*, 432 U.S. 282, 303 (1977); see *Sheppard*, 384 U.S. at 352. In *Irvin v. Dowd*, 36 U.S. 712 (1961), the Supreme Court established the method by which such examinations are conducted. See, e.g., *Murphy*, 421 U.S. at 800-03; *Beck v. Washington*, 369 U.S. 541, 556-57 (1962); see also *Dobbert*, 432 U.S. at 302-03. First, the Court in *Irvin* considered the extent and content of the publicity because it was indicative of "the then current community pattern of thought." *Irvin*, 366 U.S. at 725-27. The Court then reviewed the voir dire. In the opinions expressed by potential jurors and the difficulty encountered in finding veniremen who could at least claim impartiality, the Court discovered evidence of a pattern of prejudice in the community. *Id.* at 727. Finally the Court looked to see whether that pattern of prejudice was reflected in the testimony of the jurors ultimately seated in the jury box. *Id.* at 727-28. Considering all these factors, the Court then concluded that the jurors'

20. In addition, because petitioner is challenging a state conviction on a petition for a writ of habeas corpus, the factual findings of the state courts are presumed to be correct unless petitioner can establish by convincing evidence that the factual findings were erroneous. 28 U.S.C. §2254(d) (1976); see *Sumner v. Mata*, 449 U.S. 539 (1981). At the same time, we have a duty as a federal appellate court "to make an independent evaluation of the circumstances." *Sheppard*, 384 U.S. at 362. In particular, because the nature and strength of a venireman's opinion is a mixed question of law and fact, *Irvin*, 366 U.S. at 723, we must "independently evaluate the voir dire testimony of the impaneled jurors" and the potential jurors. *Id.*; *Martin*, 653 F.2d at 807; see *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

assurances of impartiality had to be discounted. *Id.* at 728.

1. The Publicity

47. The publicity preceding petitioner's trial was extensive and had great potential for prejudice. As in *Irvin*, petitioner's case was a "*cause celebre*" in a rural community which had been subjected to a barrage of publicity concerning a sensational murder. *Irvin*, 366 U.S. at 725; see *Murphy*, 421 U.S. at 798. That publicity, although accurate, factual in nature, and without editorial comment, see *Murphy*, 421 U.S. at 800 n.4, 802; *Beck*, 369 U.S. at 556, revealed prejudicial information "never heard from the witness stand" in the second trial. See *Sheppard*, 384 U.S. at 356.

48. First, the publicity disclosed that the jury in the first trial had convicted petitioner of the murder. Few revelations could be so damning to an accused. *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978). Possibly even more prejudicial was the disclosure of petitioner's written confessions and his testimony at the first trial. See *Rideau*, 373 U.S. 723; *United States v. Haldeman*, 559 F.2d 31, 61 (D.C. Cir. 1976) (in banc) (per curiam), cert. denied, 431 U.S. 933 (1977); see also *United States ex rel. Doggett v. Yeager*, 472 F.2d 229, 231 (3d Cir. 1971). The confessions and testimony detailed in a highly unfavorable light petitioner's actions and thoughts at the time of the homicide. They were sworn revelations of information which petitioner's properly admitted oral statements simply did not convey. Cf. *Stroble v. California*, 343 U.S. 181, 195 (1952) (confession printed in newspaper was introduced into evidence); see also *United States v. D'Andrea*, 495 F.2d 1170, 1172-73 (3d Cir.) (per curiam), cert. denied, 419 U.S. 855 (1974). Finally, the publicity revealed that petitioner at the first trial had pled temporary insanity and had been convicted of rape. Such highly inflammatory

facts carried too great a risk of prejudice to be directly offered as evidence. See *Marshall*, 360 U.S. at 312-13; *United States ex rel. Greene v. New Jersey*, 519 F.2d 1356 (3d Cir. 1975) (per curiam). "The exclusion of such evidence in court is meaningless when the news media makes it available to the public." *Sheppard*, 384 U.S. at 360; see *Murphy*, 421 U.S. at 802.

49. The publicity was understandably most extensive and most potentially prejudicial before and during petitioner's first trial, which was four years before his second trial. The passage of time may work to erase highly unfavorable publicity from the memory of a community. See, e.g., *Murphy*, 421 U.S. at 802; *Beck*, 369 U.S. at 556. In this case, however, voir dire revealed that more than 98 percent of the veniremen questioned remembered the case. In part this was due to the repeated community exposure provided by newspaper coverage of the appeal and retrial²¹ which helped keep fresh the imprint of the case in the minds of the public.²² More im-

21. The state trial court, though the record contained at least 17 front-page articles, said that between trial and retrial "there was practically no publicity given to this matter through the news media . . . except to report that a new trial had been granted by the Supreme Court." App. at 751a. We believe, however, that petitioner has established by convincing evidence that the state court's characterization of the coverage was erroneous. 28 U.S.C. §2254(d) (1976). The record on this petition indicates that 66 front-page articles were published covering the appeal and second trial. Cf. *Sumner v. Mata*, 449 at 547 (federal and state court had identical record). We agree with the magistrate who after two days of evidentiary hearings found that the second trial "was surrounded with publicity, but not to the same degree" as the first trial. App. at 136a.

22. The trial court stated that "as far as this Court can recall" there was little talk in public concerning the second trial. App. at 196a. Veniremen during voir dire indicated, however, that there had been public discussion of the case, particularly in last weeks before retrial. Such discussion apparently did not reach the attention of the trial court.

portant, the publicity attending the homicide and first trial had been so extensive and intensive that the case was firmly implanted in the memories of Clearfield County residents.

50. Petitioner has established that the publicity before his second trial had revealed prejudicial information from his first trial, information which was not officially in evidence against him. The widespread dissemination of such extra-record information, while not rendering the jury presumptively prejudiced, poisoned the "general atmosphere of the community" in which petitioner was retried. See *Murphy*, 421 U.S. at 802. If petitioner can show that that atmosphere caused actual prejudice in the jurors, their assurances of impartiality can be disregarded. *Id.*

2. The Voir Dire

51. The difficulty of voir dire may provide crucial evidence that the sentiments of the community were so poisoned against an accused as to impeach the asserted indifference of his jurors. *Murphy*, 421 U.S. at 803. "The length to which the trial court must go in order to select jurors who appear to be impartial" reveals a great deal about those jurors' assurances of impartiality:

In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

The trial court also noted that few spectators had attended trial on some days, particularly during voir dire. Because petitioner alleges prejudice not from a "circus atmosphere" in the courtroom, see *Murphy*, 421 U.S. at 798; *Martin*, 653 F.2d at 805, but from public knowledge of extra-record facts, occasional low attendance is a factor of limited significance.

Id. at 802-03.

52. In this case, as in *Irvin*, "impartial jurors were hard to find." *Irvin*, 366 U.S. at 727. In the long and difficult voir dire²³ 163 veniremen were questioned on the case. Our independent examination of the voir dire testimony shows that 126 prospective jurors, or 77 percent of the 163 veniremen questioned, admitted that they would carry an opinion into the jury box. The trial court itself excused on challenges for cause 117 of those veniremen, or 72 percent of the 163, after they stated that they could not set aside their opinion.²⁴ Only when petitioner had exhausted his peremptory challenges could enough jurors be found to fill the jury box. Cf. *Dobbert*, 432 U.S. at 302 (peremptory challenges not exhausted); *United States v. Gorel*, 622 F.2d 100, 103-04 (5th Cir.) (same), *cert. denied*, 445 U.S. 943 (1980).

53. In *Irvin* the trial court dismissed for cause 268 of 430 veniremen, or 62 percent, because they had fixed opinions concerning the petitioner's guilt. Almost 90 percent of those examined entertained some opinion as to guilt. 366 U.S. at 727. In those circumstances the Supreme Court "readily found actual prejudice against the

23. The trial court explained that the voir dire was lengthy because petitioner was permitted to ask so many questions. App. at 194a-95a, 751a. The court did indeed extend great leniency to petitioner in his questioning of the veniremen. Such leniency was commendable. It was also necessary under the circumstances, and does not explain away the difficulty of the voir dire as a real factor in our consideration.

24. The trial court stated that the difficulty in selecting a jury was due in part to his leniency in granting challenges for cause. App. at 195a, 751a. In our independent evaluation, each of the 117 veniremen dismissed for cause by the trial court had expressed a disqualifying prejudice which required dismissal. In fact, as we have noted, the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors.

petitioner to a degree that rendered a fair trial impossible." *Murphy*, 421 U.S. at 798; accord *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 368-69 (2d Cir. 1962) (in banc) (31 of 38 veniremen questioned had formed opinion), *cert. denied*, 372 U.S. 978 (1963). By contrast, in *Murphy* the Court found no basis to cast doubt on the juror's assurances of impartiality where only 20 of 78 veniremen questioned, or 26 percent, were excused because they disclosed an opinion as to guilt. *Id.* at 803; accord *Beck*, 369 U.S. at 556 (14 of 56 veniremen might have had opinions); *Martin*, 653 F.2d at 806 (23 of 81 veniremen questioned had opinions); *Brinlee v. Crisp*, 608 F.2d 839, 845 (10th Cir. 1979) (19 of 47 veniremen questioned had opinions), *cert. denied*, 444 U.S. 1047 (1980); *Haldeman*, 559 F.2d at 70 & n.56 (29-36 percent of veniremen arguably had opinions), *cert. denied*, 431 U.S. 933 (1977); *Mastrian v. McManus*, 554 F.2d 813, 818 (8th Cir.) (41 of 92 veniremen questioned had opinions), *cert. denied*, 433 U.S. 913 (1977).

54. In the instant case voir dire revealed other indications of a deep and bitter prejudice present in the community. One venireman apparently veiled his strong feelings when testifying. Another said that her fellow parishoners tried to influence her to vote guilty. Many veniremen volunteered opinions of guilt, and over 90 percent of those asked said they had discussed the case or heard others express their opinions.

55. We believe that the voir dire in this case more strongly resembles that of *Irvin* than that of *Murphy*. See *Martin*, 653 F.2d at 806. Three-quarters of the veniremen admitted to an opinion of guilt which they could not set aside. "Where so many, so many times, admitted prejudice, [a juror's] statement of impartiality can be given little weight." *Irvin*, 366 U.S. at 728; *Martin*, 653 F.2d at 806.

3. The Jurors Selected

56. The prejudice permeating the voir dire and the community was reflected in the voir dire testimony of the majority of the twelve jurors and two alternates ultimately placed in the jury box.²⁵ All but one of the jurors were familiar with the case, and several explicitly recalled petitioner's conviction or confessions. Eight out of fourteen jurors would admit that, before hearing any testimony, they had formed an opinion as to petitioner's guilt or innocence. Cf. *Irvin*, 366 U.S. at 727 (8 of 12 had formed opinions); *Denno*, 313 F.2d at 367-68 (8 of 16 had formed opinions).²⁶

With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detach-

25. The alternate jurors were dismissed and did not participate in the jury's deliberations. An alternate who did not deliberate does not contaminate a jury unless there is reason to believe that the jury had been exposed to the alternate's prejudicial information or opinion. See *United States v. Vento*, 533 F.2d 838, 860-70 (3d Cir. 1976). In this case the jurors were told they could discuss the case among themselves when sequestered. For four days the two alternate jurors were seated and sequestered with the regular jurors. Even though there is no evidence that the prejudiced alternates talked to the regular jurors, such a sustained condition of "continuous and intimate association" operates to subvert the requirement that the jury's verdict be based on evidence developed from the witness stand. See *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (jurors guarded by deputy sheriffs who were witnesses); see also *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971).

26. As a result of our independent evaluation, we must therefore reject the trial court's conclusion that "almost all, if not all, [of the first twelve] jurors . . . had no prior or present fixed opinions." App. at 196a.

ment from the mental processes of the average man.

Irvin, 366 U.S. at 727 (citation omitted). Indeed, when asked whether they could set their opinions aside and forget what they had heard, many of the jurors gave uncertain and ambiguous answers. Even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went "so far as to say that it would take evidence to overcome their belief." *Id.* at 728; *Murphy*, 421 U.S. at 798.²⁷

57. It is hardly surprising that the assurances of impartiality given by petitioner's jurors were equivocal or negative. It is more surprising that some could indeed give blanket assurances of impartiality. Petitioner's jurors were members of a community barraged by publicity and alive with discussion, a community where three quarters of those called would admit to a disqualifying prejudice. Those jurors were then asked to forget that petitioner had been convicted of the murder, and rape, of Pamela Rimer. They were asked to forget how petitioner twice in writing and once on the stand had retold in detail that he had killed her, and how he had offered no

27. Petitioner did not challenge nine jurors. Because Pennsylvania at the time of retrial required that objection be made before the jury retired to deliberate, Pa. R. Crim. P. 1106(d) (1975), petitioner's failure to challenge a juror for cause waived objection to that particular juror, *Provenzano*, 620 F.2d at 996 n.15, unless petitioner can show cause for failing to object and prejudice therefrom. *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir. 1982); *Graham v. Mabry*, 645 F.2d 603, 606 (8th Cir. 1981); see *Engle v. Isaac*, 456 U.S. 107, 130 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Where as here a fair trial was impossible not because of a particular juror but regardless of the particular jurors, challenge of any individual juror for cause is not required. Failure to challenge any of the jurors selected, however, is "strong evidence" that the accused thought the jurors were not biased. *Beck*, 369 U.S. at 557-58.

defense except for temporary insanity. Those jurors were asked to forget all they knew and put their impressions and opinions aside. Such a request took insufficient account of "the frailties of human nature." *Irvin*, 366 U.S. at 728.

58. "Impartiality is not a technical conception. It is a state of mind." *Id.* at 724 (quoting *United States v. Wood*, 299 U.S. 123, 145 (1936)). We must view the jurors' assurances of impartiality in light of the pretrial publicity, the difficulty of voir dire, and the testimony of the jurors selected. We conclude that despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County. After examining the totality of circumstances, we hold that petitioner's retrial was not fundamentally fair.

III. CONCLUSION

59. We will affirm that part of the district court's order holding that petitioner's constitutional right against self-incrimination was not violated by the admission into evidence of his oral statements. We will vacate that part of its order holding that retrial in Clearfield County did not infringe petitioner's right to a fair trial by an impartial jury.

60. Petitioner's detention and sentence of life imprisonment are in violation of the Constitution of the United States. He is therefore entitled to be freed from that detention and sentence. Petitioner is still subject to custody under the indictment, however, and he may be retried on this or another indictment. *Irvin*, 366 U.S. at 728.

61. We will remand the case to the district court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth shall afford petitioner a new trial.

STERN, *District Judge*, concurring.

Under any test reflecting even the most minimal respect for the values embodied in the sixth amendment, we would be compelled to invalidate this conviction. My concern, however, is with the particular constitutional standard which for 175 years has guided the lower courts, which we are obligated to apply today, and which renders constitutional trials taking place under circumstances only slightly less shocking than those presented in this case.

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme court, crystalizing earlier language from *United States v. Burr*, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807) (No. 14,692g) (Marshall, C.J.); *Reynolds v. United States*, 98 U.S. 145, 155-156 (1878); *Spies v. Illinois*, 123 U.S. 131, 179-80 (1887), and *Holt v. United States*, 218 U.S. 245, 248 (1910), established that it is permissible to empanel a jury composed of 12 persons, all of whom have a preconceived opinion that the defendant is guilty, as long as each promises to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723. *Accord* *Murphy v. Florida*, 421 U.S. 794 (1975); *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

According to the *Irvin* Court: "[T]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Irvin*, 366 U.S. at 723. I cannot see why it is "impossible" to obtain jurors who do not begin with a bias. The test I suggest would not disqualify a juror merely because he has been exposed to pretrial publicity; rather, only those who represent that they have formed an opinion — irrespective of the degree of its fixation — must be excluded automatically from jury participation.

There can be but two possible explanations for the *Irvin* standard. The first is that it presumes to be meaningful: that a promise to lay aside an opinion, for example, that an accused high school teacher brutally killed one of his own students is either believable or enforceable. Definitive refutation of this precept as a psychological matter is, of course, beyond my capabilities, but I would venture that no one of us would want to gamble our freedom on the ability of a person to erase a preformed opinion as to guilt.¹ Moreover, even if such self-imposed amnesia is possible as a cognitive event, surely its prediction is not reliable — that is, we cannot expect a person to know with any degree of accuracy at the time of voir dire whether or not he will be able to lay aside an opinion, however desirous he is of achieving that end. I see no reason to subject our jury system to the hazards of guesswork, particularly where the alternative is so easily achieved. Thus, I reject the *Irvin* standard as a means to insure impartial jurors.²

1. Commentators with psychological training have come to the same conclusion. See, e.g., Comment, Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial; A Plea for Reform, 38 S. Cal. L. Rev. 672, 682 & nn.53, 54 (1965); see also Stanga, Jr., Judicial Protection of the Criminal Defendant Against Adverse Press Coverage, 13 Wm. & Mary L. Rev. 1, 5 & n.23 (1971).

2. The voir dire at the celebrated trial of "Boss" Tweed over 100 years ago provides a wonderful example of the strain imposed upon any notion of "impartiality" by the "laying aside" standard. Various veniremen, all of whom indicated a preformed opinion of some degree, revealed a variety of strategies by which they felt they could rid themselves of their initial partiality. In listening to their voices, we must decide if it makes sense to continue the same dialogues today.

One venireman suggests that he is able to lay aside his opinion as a matter of duty:

Q. If you were to go into that jury box, would you require any evidence whatever to remove the impression that you now have?

The second conceivable rationale for the *Irvin* test is that it is a practical necessity, without which the empanelling of juries would be impossible. I simply refuse to believe that in a land as populous as ours, where potential jurors abound, the only way to assemble a group of 12 impartial persons is to allow those with advance opinions to sit as long as they give a proper incantation of their ability to lay aside those opinions. If a jury cannot be selected without resort to persons with preformed views of a defendant's guilt, it should be a simple matter to transfer the case to another county. There is simply no societal interest advanced by seating a juror who has openly stated that he has a view concerning the defendant's guilt, notwithstanding that it can be "laid aside."

A. Not as a juryman; no, sir.

Q. Your belief as a juryman is a different thing from your belief as a man?

A. If any one should come up in the street and tell me Mr. Tweed was an innocent man, I should not at once believe it unless he gave me some proof to the contrary; but in the jury-box I go in there free from any prejudice as a juryman. I think that is the duty of the juryman, that it ought not to require any evidence at all to remove any impression. That is what I intended to convey in my answer to the judge.

Record of *People v. Tweed*, 50 How. Pr. 262 (N.Y. Sup. Ct. 1876) at 104. Another admits that the process is unpredictable:

Q. If you were to go into the trial as a juror would you not carry that same [preformed] impression into the jury-box?

A. I think if I was called upon to serve as a juror I could free my mind from all prejudice or impressions and act impartially; that is my belief.

Q. Have you ever tested that belief in a like case?

A. Never, sir.

Q. It would be an experiment on your part?

The vulnerability of the *Irvin* "laying aside" standard is only heightened where attempts to temper its potentially devastating consequences for a criminal defendant are examined. The *Murphy* Court pointed out that,

[T]he juror's assurances that he is equal to this task [laying aside prior opinion] cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."

Murphy, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723). I am at a loss to understand how a defendant would ever be able to demonstrate that despite a venireman's assurance that he is able to lay aside a preconception of defendant's guilt, there actually exists in the potential juror's mind a "fixed" opinion which cannot be extinguished.

NOTE — (Continued)

A. Certainly it would

Id. at 142-43. Another views the process as one of degrees of belief:

The Court — I would like to have you give in your own way and in your own language the condition of your mind in regard to Mr. Tweed or his dealings with the city.

The Witness — My view is this: I read the newspaper like everybody else; I have heard the proceedings, and of the charges against Mr. Tweed like everybody else. I have certain superficial information; on that superficial information I have formed an opinion; that is all I have had to do, and all I have seen the necessity of doing; I have never looked into the case with any degree of particularity; I have never examined the evidence as a lawyer would have examined it. I have formed an opinion; I do not consider that I have formed what I call a decided opinion, because I have not looked into it so thoroughly as to entitle me to have that opinion, but I have given it this general superficial examination. I am now here and am called upon this struck jury, and if I am to serve as jurymen, I believe that I

My view of the proper standard by which to measure the propriety of seating a particular juror does away with the distinction between opinions that are "fixed" and those that are something less so, as a spectral analysis empty of meaning. A person with any opinion going to the issue of a defendant's guilt is simply unfit to serve on a jury. It is incredible to me that anyone would want to take the contrary view. Further, in a highly publicized case, I would discredit the denial of preconceived opinions where a significant percentage of those polled state that they hold opinions concerning the defendant. While the Court has recognized that veniremen prejudice may be presumed in the face of protestations to the contrary where most of the other prospective jurors admit to a disqualifying bias, *compare Irvin*, 366 U.S. at 727 (nearly

can act conscientiously and fairly for Tweed and fairly for the County. I have been asked the question whether I would prefer that Tweed should succeed or the County, and I have answered that I should prefer that the County should succeed. I do not mean that I would have any bias which would make me decide against Tweed, for the County or against the County for Tweed; I would be prepared to decide according to the evidence.

Id. at 94-95. Another describes the process as a function of will:

Q. But could you, no matter what form of oath were put to you, enter upon the trial without having the impression upon your mind that Mr. Tweed has been guilty of those frauds?

A. I should try.

Q. Could you succeed?

A. I think so.

Q. You think that you could forget what you now believe?

A. I think I could dismiss it from my mind; forget it, no.

Id. at 204.

All of these veniremen were seated as competent jurors.

90 percent of veniremen have some opinion regarding defendant's guilt; prejudice in remainder presumed), *with Murphy*, 421 U.S. at 802 (roughly 26 percent of veniremen have an opinion; no presumption regarding remainder), I would not allow any jury to be empanelled where more than 25 percent of the veniremen state that they hold an opinion concerning the defendant's guilt. Where over one quarter of those polled indicate such bias, I have grave doubts as to the sincerity of representations of impartiality by others in the community.

It has long been the foundation of our legal system that, "[N]o man's life, liberty or property be forfeited as criminal punishment for violation of that law until there ha[s] been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940). I do not see how we can live by this ideal while continuing to apply the *Irvin* test. I would adopt a different standard, originating at the confluence of sense and simplicity, which would prevent any person from entering the jury box and becoming a judge of the facts if he has any preconceived view of the merits of the case.

GARTH, *Circuit Judge*, concurring in the judgment.

In this case Juror James F. Hrin, who sat in judgment of the petitioner, Jon Yount, admitted during his *voir dire* that until he was shown facts establishing Yount's innocence, he would find it difficult to change his opinion about Yount's guilt. Because I conclude that Hrin, by so testifying during the *voir dire*, demonstrated "the actual existence of such an opinion in the mind of [one of Yount's] juror[s] as will raise the presumption of partiality," *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Irvin v. Dowd* 366 U.S. 717, 723 (1961), I concur in the judgment of the court that a new trial is required.

My concurrence, however, is limited to the issue raised by Yount's charge that Juror Hrin had been improperly impaneled. Thus, while I agree with Judge Hunter that Yount's fifth amendment rights were not violated when his inculpatory statements were admitted at his second trial, I do not agree with Judge Hunter that pre-trial publicity required a change of venue. As I read the record, it was the failure of the trial judge to apply the principles of *Irvin, supra*, in excusing jurors for cause that resulted in an unfair trial. Thus, I restrict my vote for a remand and new trial solely to the issue of Juror Hrin's impaneling as a juror, and do not agree with Judge Hunter's thesis that the district court erred in denying a change of venue.

I.

As the majority notes, Yount had been convicted of murder and rape in 1966. After the Pennsylvania Supreme Court set aside both of these convictions in 1969, Yount was tried a second time for murder in November of 1970. The voir dire in this second trial exhausted ten days and 167 veniremen¹, 121 of whom were dismissed for cause.

Among the twelve jurors and two alternates selected to try Yount, six testified that they had formed no opinions as to Yount's guilt. Five jurors stated that they had formed opinions about the case, but that they could lay those opinions aside and keep an open mind. Finally,

1. Two hundred ninety-two persons were selected as talesmen for Yount's second trial, 125 of whom the court dismissed as improperly chosen after learning that the Clearfield County sheriff had selected friends and acquaintances of his own in order to obtain a full complement of jurors. The court dismissed an additional four jurors for cause before questioning. Although the Magistrate's report lists 168 jurors who were questioned, I agree with Judge Hunter that the record reveals only 167.

three jurors — both of the alternates and Juror James F. Hrin — testified that they had opinions of Yount's culpability but could change these opinions if the proper evidence were presented.²

Juror Hrin's voir dire examination by the prosecution disclosed that Hrin was uncertain whether he could render a verdict based solely on the evidence adduced at trial. Responding to two questions by the prosecutor, Hrin asserted that he "wouldn't say for sure" whether he could "erase or remove the opinion" he held, but stated a second time that he could do so. Hrin's answers were punctuated with suggestions that he thought he "possibly could" render a fair verdict, and that "[i]t would be rather difficult for me to answer" whether he "could enter the jury box presuming [Yount] to be innocent."³

2. Neither alternate juror participated in the jury's deliberations. Their impartiality is not challenged before us.

3. Hrin's voir dire examination by the prosecutor was as follows:

Q. Have you formed any opinion as to the guilt or innocence of Mr. Yount?

A. To the degree that it was written up in the papers, yes.

Q. Is this a fixed opinion on your part?

A. This is sort of difficult to answer.

Q. Let me ask — if you were to be selected as a juror in this case and take the jury box, could you erase or remove the opinion you now hold and render a verdict based solely on the evidence and law produced at this trial.

A. It is very possible. I wouldn't say for sure.

Q. Do you think you could?

A. I think I possibly could.

Q. Then the opinion you hold is not necessarily a fixed and immobile opinion?

A. I would say not, because I work at a job where I have to change my mind constantly.

Q. Would you be able to change your mind regarding your opinion before become a juror in this case? That's the way I must have you answer the question.

Under cross examination by counsel for the defendant Yount, Hrin asserted that he would require the production of evidence before he would abandon any opinion of Yount's guilt. Hrin stated as follows:

Q. Did I understand Mr. Hrin you would require some — you would require evidence or something before you could change your opinion you now have?

A. Definitely. If the facts show a difference from what I had originally had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind — is that your position?

A. Well — I have nothing else to go on.

Q. I understand. Then the answer is yes — you would not change your mind until you were presented facts?

A. Right, but I would enter it with an open mind.

Q. In other words, you're saying that while facts were presented you would keep an open mind and after that you would feel free to change your mind?

A. Definitely.

A. If the facts were so presented I definitely could change my mind.

Q. Would you say you could enter the jury box presuming him to be innocent?

A. It would be rather difficult for me to answer.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the Judge?

A. That I could do.

Q. But you would not change your mind until the facts were presented?

A. Right. . . .

Yount promptly challenged Juror Hrin for cause, a challenge the trial court denied because "he declared he could go in there with an open mind." The trial court reasoned as follows:

I deny the challenge for cause because he declared he could go in there with an open mind; and Commonwealth against Bentley [287 Pa. 539, 135 A. 310 (1926)] sets forth that — any juror is incompetent who has a fixed and definite opinion which cannot be erased by hearing and evidence — and he said he could disregard it and be guided by the law and evidence, and I believe he stated he could go in with an open mind. I would accept that as being sufficient to overcome the conviction that you proposed that he has a fixed opinion that he could not put aside and I think his answers were unequivocal [sic] enough as to any fixation as to opinion as he declared although he had a solid opinion it is not quite as solid as it used to be which indicates that it is not solid. His expression is such that there is not now a fixed opinion and therefore I so accept it.

On appeal, the Pennsylvania Supreme Court concluded summarily that "[t]he record shows that none of the jurors had a fixed opinion as to appellant's guilt or innocence, or was otherwise legally unable to serve." *Commonwealth v. Yount*, 455 Pa. 303, 314, 314 A.2d 242, 248 (1974).

On January 8, 1981, Yount filed *pro se* a petition for habeas corpus. Paragraph 12-B of the petition asserted in part that "two [jurors] stated that they would require Petitioner to prove his innocence." In light of the record in this case, it is patent that one of the jurors referred to

in paragraph 12-B is Juror Hrin.⁴ The district court reviewed pertinent portions of each of the jurors' voir dire testimony, including Hrin's, but did not concentrate on Hrin's testimony in particular, and made no findings respecting it. See *Yount v. Patton*, 537 F. Supp. 873, 880 (W.D. Pa. 1982). Yount argues before us on appeal that Hrin had abandoned the presumption of innocence, and that Yount could not constitutionally be convicted by a panel containing such a juror.

II.

As the Supreme Court in *Nebraska Press Association v. Stuart* stated, "pretrial publicity — even pervasive, adverse publicity — does not inevitably lead to an unfair trial." 427 U.S. 539, 554 (1976). In order to explain fully why I do not believe the district court erred in denying a change in venue due to alleged prejudicial publicity, it is useful to review those circumstances in which jury exposure to adverse publicity does require a new trial.

First, the accused may demonstrate the actual existence of prejudice attributable to pretrial publicity on the part of one or more members of the jury. See *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Such prejudice must be shown "not as a matter of speculation but as a demonstrable reality," *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956), and is usually established by

4. There is therefore no question that the issue of Hrin's partiality is before us on appeal. See *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3d Cir. 1978) ("[w]e can consider any issue, previously considered by the Pennsylvania courts, which was presented to the district court and would be ground for a reversal"). I assume that the other juror referred to in paragraph 12-B was an alternate juror. No alternates were substituted for members of the jury which convicted Yount. See note 2 *supra*.

reliance on the jurors' *voir dire* responses. See *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir.), *cert. denied*, 103 S. Ct. 102 (1982).

Second, in extreme cases of highly inflammatory pretrial publicity which saturates the community from which the jury is drawn, the accused may rely on a presumption of partiality, and need not prove actual bias. See *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963); cf. *Murphy v. Florida*, 421 U.S. 794, 802-03 (1975); *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981). This presumption is rebuttable, however, and the prosecution may demonstrate the impartiality of the jury by reliance on the *voir dire* testimony. See *United States v. Chagra*, *supra*, 669 F.2d at 250, 252-54; *United States v. Johnson*, 584 F.2d 148, 154 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); *United States v. Gullian*, 575 F.2d 26, 29-30 (1st Cir. 1978).

Third, the accused can demonstrate "a significant possibility of prejudice," *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978), and that the *voir dire* procedure was inadequate to permit its discovery. See *United States v. Blanton*, 700 F.2d 298, 307-08 (6th Cir. 1983); *United States v. Dellinger*, 472 F.2d 340, 374-75 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968); cf. *United States v. Capo*, 595 F.2d 1086, 1092 n.6 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *United States v. Haldeman*, 559 F.2d 31, 64-71 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Addonizio*, 451 F.2d 49, 65-67 (3d Cir. 1971), *cert. denied*, 405 U.S. 1048 (1972).

In addition, in two classes of cases the accused may assert that events transpiring during the course of trial rendered the trial unfair. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Estes v. Texas*, 381 U.S. 532

(1965), the Supreme Court condemned the conduct of trials "utterly corrupted by press coverage." See *Dobbett v. Florida*, 432 U.S. 282, 303 (1975). In these cases, the presence of the press during trial rendered the conduct of a fair trial impossible.⁵ A similar intrusion into the trial process occurs when members of the jury are exposed to publicity during the trial. See *Marshall v. United States*, 360 U.S. 310, 311 (1959); *Goins v. McKeen*, 605 F.2d 947, 952-54 (6th Cir. 1979); *United States v. Williams*, 568 F.2d 464, 468 (5th Cir. 1978); *United States v. Jones*, 542 F.2d 186, 194-97 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

In this case, no juror was exposed to adverse publicity during trial, and the record reflecting the publicity preceding Yount's second trial, in my opinion, was not so inflammatory as to give rise to a presumption of partiality. In addition, it is conceded that the trial court "extend[ed] great leniency to [Yount] in his questioning of the veniremen," Maj. op., typescript at 33 n.23, and no argument is raised that the *voir dire* was less than ample to expose the prejudices of potential jurors. Therefore, the only basis for upsetting Yount's conviction is the existence of the "actual prejudice" of one or more members of the jury.

An accused may demonstrate "actual prejudice" on the part of the jury in two ways. First, the defendant may

5. Although *Rideau v. Louisiana*, *Sheppard v. Maxwell*, and *Estes v. Texas* are frequently discussed as a unit, see, e.g., *United States v. Dozier*, 672 F.2d 531, 545-46 (5th Cir.), cert. denied, 103 S. Ct. 256 (1982), *Sheppard* and *Estes* should be recognized as analytically distinct from *Rideau*. *Rideau* represents the only instance in which the Supreme Court has reversed a conviction solely on the basis of the extent and nature of pretrial publicity without a showing of actual prejudice. See *Mayola v. Alabama*, supra, 623 F.2d at 997. *Sheppard* and *Estes*, in contrast, represented intrusions into the trial process which undermined the integrity of the trial. See *United States v. Chagra*, supra, 669 F.2d at 249 n.10; *United States v. Haldeman*, supra, 559 F.2d at 61 n.32.

establish, by means of the *voir dire* testimony, that one or more jurors had a preconceived opinion of the defendant's guilt which could not be set aside in order to "render a verdict based on the evidence presented in court." *Irvin v. Dowd*, *supra*, 366 U.S. at 723. In such a case, the trial court would err by not granting a challenge to this juror for cause. A change of venue, however, would not be required if the challenge for cause were granted.

Second, in extremely rare circumstances the accused may establish "actual prejudice" by inference. See *Murphy v. Florida*, 421 U.S. 794, 803 (1975). In such a case the defendant must demonstrate "a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." *Id.* In the only Supreme Court case to rely on this ground, *Irvin v. Dowd*, ninety percent of those examined on the point had a preconceived notion of the defendant's guilt, and eight persons who actually sat in judgment of the defendant thought the defendant guilty. 366 U.S. at 727. Indeed, just recently this court refused to apply the *Irvin* principle to reverse a conviction in which only 23 of 71 persons known to be exposed to pretrial publicity had fixed opinions of the defendant's guilt. *Martin v. Warden*, 653 F.2d 799, 806 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). Thus while I agree that if the defendant establishes the existence of a community "so poisoned against the [defendant] as to impeach the indifference of jurors who displayed no animus," then a change of venue is required, I do not agree that merely because a number of prospective jurors harbor opinions of guilt, that the *voir dire*, fairly conducted, cannot screen the biased from the fair-minded.

A showing of actual prejudice by this method is not to be lightly accomplished. As the Fifth Circuit stated in *United States v. Dozier*, 672 F.2d 531, 546 (5th Cir.), *cert. denied*, 103 S. Ct. 256 (1982), "detection of actual prejudice is not accomplished through juggling statis-

tics." *Irvin* does not establish a bright-line rule that a venire containing a percentage of biased talesmen above a certain level is presumptively bad. Rather, the court must examine the totality of the circumstances, including the adequacy of the *voir dire* in ferreting out biased jurors, in order to establish whether a change of venue is constitutionally required.

A thorough and skillfully conducted *voir dire* should be adequate to identify juror bias, even in a community saturated with publicity adverse to the defendant. As the District of Columbia Court of Appeals noted, "voir dire has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner." *In re Application of National Broadcasting Co.*, 653 F.2d 609, 617 (D.C. Cir. 1981) (footnotes omitted). For this reason the courts of appeals have repeatedly expressed "confidence in the effectiveness of a skillful voir dire to counteract the the threat of pretrial publicity." *United States v. Duncan*, 598 F.2d 839, 865-66 (4th Cir.), cert. denied, 444 U.S. 871 (1979). Reviewing the conviction of Lieutenant William Calley for the killing of civilians at My Lai, a trial that generated considerably more pretrial publicity than Yount's second trial in 1970, the Fifth Circuit observed that "[t]here has been a greater willingness to uphold a trial court's determination that jurors were capable of rendering an impartial verdict where that conclusion was reached after deliberate, searching, and thorough *voir dire*." *Calley v. Callaway*, 519 F.2d 184, 209 n.45 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976). See also *Graham v. Mabry*, 645 F.2d 603, 611 (8th Cir. 1981); *United States v. Capo*, 595 F.2d 1086, 1091-92 (5th Cir. 1979), cert. denied, 444 U.S. 1012 (1980); *Margoles v. United States*, 407 F.2d 727, 729-31 (7th Cir.), cert. denied, 396 U.S. 833 (1969).

As *Irvin* makes plain, a juror's subjective affirmation of impartiality is not dispositive of the question of ju-

ror bias. It has always been clear that "merely going through the form of obtaining jurors' assurances of impartiality is insufficient." *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir.), cert. denied, 372 U.S. 978 (1963). Instead, the trial court must determine independently and objectively whether the jurors' assurances are credible. See *United States v. Blanton*, 700 F.2d 298, 307-08 (6th Cir. 1983); *United States v. Gerald*, 624 F.2d 1291, 1296-97 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981). The American Bar Association's Standards for Criminal Justice provide that the *voir dire* "shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial." *ABA Standards for Criminal Justice* §8-3.5 (2d ed. 1978). The objective evaluation of this information, however, rests with the trial court. In *Irvin*, the trial court (which itself questioned the jurors challenged for cause) did not engage in a searching and thorough *voir dire*. Instead, the court erroneously credited the jurors' subjective opinions that each could render an impartial verdict notwithstanding his or her opinion. *Irvin v. Dowd*, *supra*, 366 U.S. at 724.

Yount's case, however, differs significantly from *Irvin v. Dowd*. First, counsel themselves conducted the *voir dire* in Yount's trial and, as Judge Hunter concedes, were afforded great leniency in the questioning of veniremen. Second, Yount challenged only three jurors for cause, and two of those jurors, according to the district court's findings, "indicated that they harbored no fixed opinion." *Yount v. Patton*, *supra*, 537 F. Supp. at 878. Third, the trial court permitted questioning on the exposure of each juror to publicity and the degree of fixation of each juror's opinion. Six of the jurors testified that they had no preconceived opinion of Yount's guilt at all. Among the remaining six jurors, Yount challenged only one — Juror James F. Hrin, whom I discuss below

— for cause. The scope and depth of the *voir dire*, and the absence of challenges for cause to each juror except Hrin, was adequate to support an independent and objective determination that, with the exception of Hrin, the jurors could “lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court.” *Irvin v. Dowd*, *supra*, 366 U.S. at 723.

Judge Hunter, however, discounts the extensive *voir dire* conducted in Yount's 1970 trial and the absence of challenges for cause to each juror except Hrin. Rather, Judge Hunter's opinion places great weight on the finding that “77 percent of the 163 veniremen questioned admitted that they would carry an opinion into the jury box.” Maj. op., typescript at 33. To my mind, this reliance on statistics, without regard to the scope of the *voir dire* or the absence of challenges for cause, elevates to talismanic significance the percentage of veniremen as a whole with opinions about a defendant's guilt. I do not believe *Irvin v. Dowd* was ever intended to be read in this fashion. If the scope of the *voir dire* is ample — as it concededly is in this case — the fact that a large percentage of persons who are *not* on the jury have prejudices should carry little weight.

There are undoubtedly many communities in which large percentages of the veniremen have been exposed to pretrial publicity and have a notion of the defendant's guilt. The well-publicized trials of the Watergate defendants, *see United States v. Haldeman*, *supra*, and of Lieutenant William Calley, *see Calley v. Callaway*, *supra*, are undoubtedly of this character. But, the very function of the *voir dire* is to root out such persons with preconceived prejudices and identify only those who can, by the trial court's independent determination, lay aside any prejudices and render a verdict based solely on the evidence adduced during trial. Thus, given a *voir dire* which is concededly adequate and which functions to achieve its designed purpose, a venue change is not

constitutionally required simply because many of the persons who will *not* serve on the defendant's jury may harbor prejudices as to the defendant's guilt.

For these reasons, I do not join Judge Hunter's holding that a change of venue in Yount's case was constitutionally required. Nevertheless, I concur in the judgment of the court because I conclude, for the reasons that follow, that Juror James F. Hrin should not have been impaneled in this case.

III.

In *Irvin v. Dowd*, 366 U.S. 717, (1961), the Supreme Court held that the mere existence of any preconceived notion as to the guilt or innocence of an accused is not, without more, sufficient to rebut the presumption of a prospective juror's impartiality. *Id.* at 723. As the Court observed, however, the adoption of such a rule does not "foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." *Id.*, quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941).

The test of a prospective juror's impartiality, articulated in *Reynolds v. United States*, 98 U.S. 145 (1878), and reiterated in *Dowd*, *supra*, is whether

"the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. . . . The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside." [*Reynolds v. United States*, 98 U.S. 145, 156-57 (1878).]

Irvin v. Dowd, *supra*, 366 U.S. at 723. See *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

Hrin's voir dire testimony, taken as a whole, demonstrates the "actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." Even the testimony adduced by the prosecution raised serious doubts whether Hrin entered the jury box with an open mind. The record reveals that Hrin asserted simultaneously that he could keep an open mind and that he could not "say for sure" whether he could do so. In response to the question whether Hrin "could enter the jury box presuming [Yount] to be innocent," Hrin conceded that "[i]t would be rather difficult for me to answer."

Testimony adduced by the defense further revealed that Hrin would require Yount to produce evidence before Hrin would abandon his preconceived opinion of Yount's guilt. Hrin affirmed that he "would not change [his] mind until [he] was presented [with] facts." Having so stated, Hrin abandoned the presumption of innocence. While the law permits a juror to affirm that he or she will enter the jury box with an open mind, a juror cannot require that the defendant produce evidence to wipe clean a prior perception or opinion. The jurors must be impartial when sworn. They cannot agree to be impartial only if the defendant convinces them to be so.

In this case, a juror, by his own admission, required the production of evidence to change his preconceived opinion of the defendant's guilt, and agreed to keep an open mind about this evidence if and when he heard it. As a matter of law, this admission raises a presumption of partiality. A defendant cannot constitutionally be convicted by a jury containing one such juror. *Irvin v. Dowd*, *supra*, 366 U.S. at 723; *id.* at 728 ("some [jurors went] so far as to say that it would take evidence to overcome their belief").

IV.

In concluding as a matter of law that Juror Hrin's testimony raises a presumption of impartiality under *Irvin v. Dowd*, *supra*, I am fully cognizant that in a federal habeas corpus proceeding, the findings of a state court "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . ." 28 U.S.C. §2254(d) (1976); see *Sumner v. Mata*, 449 U.S. 539, 551 (1981). Under *Irvin v. Dowd*, however, an opinion of a prospective juror raises a presumption of partiality by operation of law, and therefore poses a mixed question of law and fact. As the Court in *Dowd* stated,

the test is 'whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact. . . . As was stated in *Brown v. Allen*, 344 U.S. 443, 507, the "so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impeached jurors.

Irvin v. Dowd, *supra*, 366 U.S. at 723.

In this case the Pennsylvania Supreme Court concluded that "none of the jurors had a fixed opinion as to [Yount's] guilt or innocence." *Commonwealth v. Yount*, *supra*, 455 Pa. at 314, 314 A.2d at 248. Nevertheless, the trial court found that Hrin had a "solid opinion [although] not quite as solid as it used to be." Neither the trial court nor the Pennsylvania Supreme Court, however, considered the legal effect of Hrin's requirement that the defendant put on evidence to disabuse Hrin of this opinion. This latter requirement raises a presumption of partiality as a matter of law, and therefore does not impli-

cate 28 U.S.C. §2254(d). Cf. *Smith v. Phillips*, 455 U.S. 209, 218 (1982) (in which no such presumption by operation of law applied); see *id.* at 222 n.* (O'Connor, J., concurring).

V.

The sixth amendment guarantees to each defendant a fair and impartial trial by a jury of his or her peers. The right to trial by impartial jury, old as the Magna Carta, is fundamental to our system of justice. See *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968). Consistency with this constitutional provision requires that each juror lay aside a prior perception or opinion and "render a verdict based on the evidence presented in court." *Irvin v. Dowd*, *supra*, 366 U.S. at 723. Consequently, no juror may enter the jury box with an opinion that can be changed only upon the presentation of evidence by the defense. Juror Hrin admitted to requiring such evidence, and therefore could not constitutionally sit in judgment of Yount. Accordingly, while I dissent from the view expressed in Judge Hunter's opinion that a change of venue was constitutionally required, I concur in the judgment of the court, which directs that the writ of habeas corpus be issued unless Yount is retried within a reasonable time. I do so, however, only for the reason that Juror Hrin was improperly seated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Jon E. YOUNT, Petitioner,

v.

Ernest S. PATTON, Superintendent SCI—Camp Hill,
and Harvey Bartle III, Attorney General of the Com-
monwealth of Pennsylvania, Respondents.

Civ. A. No. 81-234.

UNITED STATES DISTRICT COURT,
W. D. Pennsylvania.

April 22, 1982.

[537 F. Supp. 873 (1982)]

OPINION

ZIEGLER, District Judge.

Presently before the court is the petition of Jon E. Yount for a writ of habeas corpus alleging that his state court conviction of first degree murder is constitutionally infirm. We hold that Yount has failed to establish a violation of the Due Process Clause of the Fourteenth Amendment and therefore relief will be denied.

I. History of Case

Petitioner was indicted for the crimes of murder and rape at No. 2 May Sessions 1966 in the Court of Common Pleas of Clearfield County, Pennsylvania. On October 7, 1966, he was convicted by a jury of first degree murder and rape and an appeal was taken from the judgment of sentence. The Supreme Court of Pennsylvania reversed and granted a new trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925, 90 S.Ct. 918, 25 L.Ed. 2d 104 (1970). The prosecutor dismissed the rape charge prior to re-trial and, following selection of a jury, Yount was again convicted of first degree murder. A life sentence was imposed. An appeal was taken.

The Supreme Court of Pennsylvania unanimously affirmed the judgment in *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974), and petitioner filed the instant pro se action, pursuant to 28 U.S.C. §2254, advancing three issues. Counsel was appointed and filed an amendment to the petition with additional contentions. On March 2, 1982, the Supreme Court of the United States announced its decision in *Rose v. Lundy*, U.S. , 102 S.Ct. 1198, 71 L.Ed. 2d 379 (1982). Counsel for petitioner then filed a motion to amend the original and amended petitions to comply with the teachings of *Rose*. There the Supreme Court explained "that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."

U.S. at , 102 S.Ct. at 1199.

On March 31, 1982, this court granted Yount's motion to delete from the original petition paragraphs 12-C(a), 12-C(b), 12-C(c), 12-C(d), 12-C(e), 12-C(f) and 12 D, as well as subparagraphs 1, 2, 3 and 4(a) through (f) of the amended petition. Thus we are required to decide the three issues raised by Yount at paragraphs 12-A, 12-B and 12 C of the original petition, since it is clear that he has exhausted the remedies available to him in the courts of Pennsylvania. See, *Brown v. Cuyler*, 669 F.2d 155 (3d Cir. 1982).

This court is limited to those issues because as *Rose* and *Brown* make clear we may consider only claims that have been exhausted in state court. In *Yount II* Justice Roberts, speaking for the Court, specifically addressed the issues raised in paragraphs 12-A, 12-B and 12-C of the original petition. We need not decide, of course, whether Yount may be precluded by Habeas Corpus Rule 9(b), 28 U.S.C. §2254, from pursuing subsequent federal petitions by seeking speedy federal review of the exhausted claims. But see, *Rose v. Lundy*, U.S. at - , 102 S.Ct. at 1203-1205. In sum, we hold that petitioner has exhausted his state court remedies as required by 28 U.S.C. §2254 (1976) with respect to the three challenges set forth in the original petition for habeas relief.

II. Discussion

Yount's original petition was referred to a magistrate of this court for consideration of the following allegations:

12-A. Petitioner's conviction was obtained by a violation of his privilege against self-incrimination through the use of oral statements elicited without required *Miranda* warnings.

12-B. Petitioner's conviction was obtained in violation of his constitutional right to select and empanel a fair, impartial and "indifferent" petit jury.

12-C. Petitioner's conviction was obtained in violation of his constitutional right to a fair and impartial trial as a result of trial court prejudicial charge to the jury and included erroneous instructions.

The magistrate issued a report and recommendation in which he found no constitutional transgression with respect to contentions 12-A and 12-C. We agree with those findings and therefore we will adopt and incorporate as the opinion of the court the findings of the magistrate as to those allegations of the original petition. We reject, however, the recommendation of the magistrate that a writ be granted and Jon Yount discharged from custody unless, within 60 days, a new trial is granted, predicated on a violation of the Due Process Clause of the Fourteenth Amendment, because petitioner was allegedly denied a fair and impartial jury.

Our starting point must be the recent pronouncement of the Supreme Court concerning the ambit of our authority to reverse this state court judgment.

A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Con-

stitution. As we said in *Cupp v. Naughten*, 414 U.S. 141, 146 [94 S.Ct. 396, 400, 38 L.Ed. 2d 368] (1973): 'Before a federal court may overturn a conviction resulting from a state trial ... it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.'

Absent such a constitutional violation, it was error for the lower courts in this case to order a new trial.... Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. *Chandler v. Florida*, 449 U.S. [560] at 570, 582-583 [101 S.Ct. 802 at 807, 813-814, 66 L.Ed. 2d 140]; *Cupp v. Naughten*, *supra*, [414 U.S.] at 146 [94 S.Ct. at 400]. No such wrongs occurred here.

Smith v. Phillips, U.S. , , 102 S.Ct. 940, 946, 71 L.Ed. 2d 78 (1982). In performing our jurisprudential function, we have been cautioned by the Supreme Court that the findings of a state court judge are presumptively correct under 28 U.S.C. §2254(d), and the presumption can only be overcome by convincing evidence to the contrary. *Id.* at , 102 S.Ct. at 946; *Summer v. Matter*, 449 U.S. 539, 551, 101 S.Ct. 764, 771, 66 L.Ed. 2d 722 (1981).

Petitioner's constitutional challenge of the decision of the trial judge to deny timely motions for a change of venue involves three discrete arguments. First, excessive and biased pretrial publicity prevented a fair trial; second, substantial community bias required a

change of venue; and third, the trial court erred in denying several challenges for cause. Petitioner bears the burden of proving all facts entitling him to discharge, *Brown v. Cuyler, supra*, at 158, and since he has raised the issue of pretrial publicity, federal law requires that Yount's conviction may be overturned only upon a showing that the publicity was so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has "utterly corrupted" the trial. *Murphy v. Florida*, 421 U.S. 794 at 798, 95 S.Ct. 2031 at 2035, 44 L.Ed. 2d 589 (1974).

A.

The record in the instant case contains two memoranda and one opinion by the trial judge relating to his decision to deny a change of venue. Pre-trial publicity is discussed in each. The first was filed on September 21, 1970, prior to selection of the jury. The court found:

[T]he evidence was limited to the fact that without editorial comment of any kinds the newspapers in the County reported the decision of the Supreme Court of Pennsylvania; but it is to be noted that they not only referred to the dissenting opinion and quoted it, but also to the majority opinion and quoted it. We do not believe that the mandates of the cases extend so far as to say that the news media cannot publicize, without editorial comment, the decisions of our Courts....

Brief of respondents at 20-21. The second memorandum is dated November 14, 1970, after 156 jurors had been interrogated during an 8-day period. The judge found:

The Court would also note that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there has been little, if any, talk in public concerning the trial from that time to the time when it was announced that a trial date had been fixed....

Nor do we find any unfair inferences or prejudicial effects as to or against the defendant resulting in any of the newspaper items which have been the subject of the affidavit filed in this regard on November 13, 1970. With all of the publicity to which they refer, this Court is cognizant that at no time since the commencement of this case on November 4, 1970, have there been any more than 4 spectators in the Court Room, and at most times, 2 of these were 'Court House hangers on.' This is some indication of the fact that particularly in a community as small as ours, there has not been any great effect created by any publicity....

Brief of respondents at 24-25. The final factual finding is found in the post-trial opinion of January 15, 1973.

The first of the trials occurred in 1966, and is pointed out herein, the second one occurred in 1970. As the record will indicate there was practically no publicity given to this matter through the news media in the meanwhile except to report that a new trial had been granted by the Supreme Court. It is to be noted also that throughout the second trial there was practically no public interest shown in the trial; one thing to be noted is that on some days there being practically no persons present even to listen to it....

The foregoing represent findings by a state court judge that are presumptively correct under the teachings of *Summer, supra*. The pretrial publicity in Clearfield County prior to trial was found to be balanced and accurate, and we cannot conclude from our independent review of the record that there is convincing evidence to the contrary.

The journalistic reports that Yount was to be retried for the crimes for which he was indicted were not inflammatory so as to preclude a fair trial. To accept petitioner's argument would require a change of venue in all prominent criminal cases that are retried merely because they are reported by the press. There is no constitutional precedent for such an assertion. The news reports concerning the exhaustion of various jury panels and the progress of voir dire are to the same effect. Finally, we find the record barren of evidence to support petitioner's contention that the journalists of Clearfield County intentionally failed to report the good faith decision of the prosecutor to dismiss the rape charge prior to trial. The decision to dismiss was based on a lack of admissible evidence at the second trial and we find that the press accurately reported the status of the case when the information became public knowledge. See, Exs. P 1-11, mm, ss, tt, uu, vv and yy.

Most importantly there is no evidence of record of official misconduct either in dismissing the rape charge prior to trial, or in influencing the publicity given the case as in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963) or *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966). Nor does the pretrial publicity reveal the

viciousness evidenced in *Rideau*, *Sheppard* or *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961). Finally, the publicity in quantity does not approach the mischief detected in *Sheppard*. We are presented, at best, with substantial knowledge in a County of 78,000 citizens that a new trial had been granted in a case involving a significant crime. We find that petitioner has failed in his burden of establishing publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County, or that the coverage utterly corrupted the judicial process. *Martin v. Warden*, 653 F.2d 799, 805 (3d Cir. 1981).

B.

Yount next contends that the trial court's decision to deny a change of venue in the face of alleged substantial community bias prevented the selection of an impartial jury and thus denied him a fair trial in contravention of the Sixth and Fourteenth Amendments. Citing statistics that support a finding of general knowledge of the pending cause, Brief of petitioner at 7-8, 26-27, and that many of the prospective jurors expressed fixed opinions as to guilt, Brief of petitioner at 27, Yount would have us hold that the trial judge committed error of constitutional magnitude when he denied a change of venue. We disagree. The extensive latitude granted by the trial judge during voir dire, as well as the responses of the twelve jurors who were sworn to try this case satisfy the constitutional standard of due process under the Fourteenth Amendment.

Again we must look to the factual findings of the trial court. In its opinion denying post-trial motions, the court found:

The mere fact that it took such a long time to select a jury was simply that defendant raised so many questions and the Court exercised its discretion to assure that there could be no complaint about the final jury empanelled. Certainly because it takes a lengthy time to select a jury is not a sufficient basis for declaring that there is any prejudice or bias whatever involved. In fact, as already indicated this Court perceived no bias or prejudice resulting in any manner.

Brief of respondents at 28. The court also made reference to this contention in its second memorandum dated November 14, 1970, after 121 jurors had been excused for cause. Twelve jurors had been seated. The court observed:

It is to be considered also that fair trial is not precluded in this case; when one recognizes that almost all, if not all, jurors already seated had no prior or present fixed opinion, and this was established by a very searching examination and cross-examination by counsel for defendant.

This ambiguous statement by the trial court and our duty of independent review requires us to examine the voir dire proceedings to determine whether there is evidence of community passion so pervasive that the accused was denied a fair trial before a "panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed. 2d 751 (1961). We find there is none.

Jurors Blair Hoover, Clair Clapsaddle, John Yorke, Mary Jane Waple, Martin Karetski, Julia C. Hummell, Mrs. Jessie M. Parks, Albert I. Undercoffer, and Robert P. Murphy were seated without challenge or objection from Yount. Thus a strong argument can be made that petitioner has failed to preserve any argument with respect to these jurors, since he was represented throughout the trial by able, experienced and prominent counsel. More importantly, however, these jurors expressed no fixed opinion concerning guilt. Jurors Irene Kurtz, John T. Harchak and James J. Hrin were challenged for cause but Kurtz and Harchak indicated that they harbored no fixed opinion, and Hrin stated that, although he had an opinion, he would keep an open mind and would base his decision on the evidence presented at trial.

Yount continues to urge that these jurors maintained a fixed opinion concerning his guilt following lengthy interrogation. But our reading of the record is to the contrary. It is true, of course, that several jurors expressed an opinion on the ultimate issue at the outset. But this does not disqualify a citizen from participation in the judicial process if the juror is able to set aside any preconceived notion and render a verdict based on the evidence presented in court. *Martin v. Warden*, 653 F.2d 799, 806 (3d Cir. 1981); *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir. 1980), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed. 2d 129 (1980).

Due to petitioner's allegation that community bias prevented the selection of a fair and impartial jury, we will review the critical responses of each juror during voir dire.

JUROR NO. 1—Blair Hoover

Q. Do you have any kind of fixed opinion as to his guilt or innocence?

A. On this question I would have to hear both sides—the facts—before I feel that I could express a true opinion.

Q. The question was, Mr. Hoover, whether or not you have an opinion now, at this time?

A. No.

Q. No opinion at all?

A. No.

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Q. And back at the time you heard these things and read these things, did you have an opinion?

A. Let's see. I would say that you'd come to some opinion, as far as just opinion on what you heard or what you may have read, but to me, as the way I've seen things in papers, in many papers, not to discredit any one paper, this don't say this is fact. So as far as forming a true opinion, I couldn't just do it by what I read. You'd read one thing and then another and somebody else would say something else. There was a lot of different opinions and I heard opinions both ways on it, in many different ways. Does that answer your question?

Q. It makes me think of a couple more.

A. Let me say this. If this would help you any, as I say, I heard as far as hearing—it wasn't

one sided. I heard both ways so until you would know the true facts you couldn't—no one could come to a true opinion.

Transcript at 64-65.

* * * * *

Q. Notwithstanding what you have read and heard concerning Mr. Yount, you are able to presume Mr. Yount innocent of any offense at this time?

A. Well, I feel any man or woman is innocent until proven guilty.

Q. My question is, do you feel that way concerning Mr. Yount at this time?

A. That would cover Mr. Yount too. I said any man or woman.

Q. You definitely have that feeling about Mr. Yount at this time—that he is innocent?

A. He would have to be innocent until proven guilty.

Transcript at 69.

JUROR NO. 2—*Clair Clapsaddle*

Q. You have formed some opinion?

A. Well, yes.

Q. Now, is that opinion rather firm and fixed in your mind?

A. Well, I couldn't say it would be, no.

Q. Are you aware of a principle of law we have in Pennsylvania that says an individual who

is accused of a crime is presumed innocent until proven guilty—are you aware of that?

A. Yes sir.

Q. Would your present opinion be such that you could accept that general rule that Mr. Yount is presently presumed innocent until proven guilty?

A. That's the way it's suppose to be and.

Q. Assuming it is supposed to be one way—my question is, will you accept it?

A. Yes.

Q. Would you?

A. Yes.

Transcript at 206-207.

* * * * *

Q. Is there anything you know of at this time which would influence your judgment in this case if you were a juror other than the evidence which would come forth in this case at this time?

A. No.

Q. Mr. Clapsaddle, at one point you did indicate you had had some opinion?

A. Yes.

Q. Are you able to erase that opinion from your mind now and afford the defendant the presumption of innocence?

A. Yes I could, yes.

Q. Having been informed again, let me just say this once more—having been informed now that the defendant is entitled to this presumption of innocence that I mentioned to you, have you erased your opinion and are you now affording the defendant that presumption?

A. That he is innocent?

Q. Yes, until proven guilty?

A. Yes.

Transcript at 210-211.

JUROR NO. 3—*John Yorke*

Q. Mr. Yorke, do you know of the matter involving Jon Young?

A. No.

Q. Have you read anything about Mr. Yount?

A. No.

Q. You don't know anything about the reason why you're here—or why you were called to come here as a prospective juror?

A. No I don't know.

Q. Have you read anything in the newspaper about it?

A. No.

Q. Have you heard any discussions or heard any radio broadcasts about it?

A. No.

Transcript at 370.

* * * * *

Q. Mr. Yorke, do you have any opinion as to this case that we're talking about. Do you know what case we're talking about now?

A. Yes, it's a Mr. Yon you say.

Q. Jon E. Yount?

A. Yes, Jon Yount.

Q. Do you have any reason—strike that—do you have any opinion as to his guilt or innocence?

A. No I have no opinion?

Q. You have no opinion at all?

A. No.

Transcript at 376.

JUROR NO. 4—*Mary Jane Waple*

Q. Do you Mrs. Waple, presently at this time, have an opinion about Mr. Yount's guilt or innocence?

A. No.

Q. You don't have any opinion at all?

A. I don't know anything about the man or about this case, only what I have read years ago and hardly remember that.

Q. Well you do remember something based upon what you read and heard several years ago—is that true?

A. Yes.

Q. Does that cause you to have an opinion at this time about him — without telling what your opinion is?

A. I don't have an opinion.

Q. You don't have any opinion?

A. No. I just don't know.

Q. You don't know what?

A. I don't know if he's innocent or guilty.

Q. I'm not asking you that.

A. I don't have an opinion. I'm not judging him.

Transcript at 412.

JUROR NO. 5—*James F. Hrin*

Q. Let me ask—if you were to be selected as a juror in this case and take the jury box, could you erase or remove the opinion you now hold and render a verdict based solely on the evidence and law produced at this trial?

A. It is very possible. I wouldn't say for sure.

Q. Do you think you could?

A. I think I possibly could.

Q. Then the opinion you hold is not necessarily a fixed and immobile opinion?

A. I would say not, because I work at a job where I have to change my mind constantly.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the

evidence as presented at trial and the law presented by the Judge?

A. That I could do.

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Q. Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?

A. Definitely. If the facts show a difference from what I had originally—had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind—is that your position?

A. Well—I have nothing else to go on.

Q. I understand. Then the answer is yes—you would not change your mind until you were presented facts?

A. Right, but I would enter it with an open mind.

Transcript at 441-442.

JUROR NO. 6—*Martin Karetski*

Q. Do you have an opinion today as to his guilt or innocence?

A. It's been a long time ago and I'm not too sure now. It was in the paper he plead not guilty.

Q. What you just read the other day--

A. I think about Tuesday or Wednesday's paper.

Q. So based upon what you read about it a long time ago as well as what you read about it within the last few days, do you have an opinion as to his guilt or innocence?

A. Honestly, I couldn't say now.

Q. Are you saying you don't have an opinion or don't know if you have an opinion?

A. I probably don't know if I have an opinion.

Q. Let me ask you this then. In case you do have an opinion, could you wipe it out of your mind—erase it out of your mind before you would take a seat in the jury box and hear whatever evidence you might hear?

A. As it is right now I have no opinion now—four or five years ago I probably did but right now I don't.

Transcript at 561-562.

JUROR NO. 7—*Julia C. Hummel*

Q. Then you do have an opinion regardless of what it was based on—do you have an opinion right now?

A. I really don't know what to say. I don't know what would be the truth, whether to say yes or no.

Q. You mean you can't tell which would be the truth and which would not be the truth?

A. I can't say that he was guilty or that he wasn't.

Q. I'm not asking you that. I'm asking whether or not you have an opinion as to which it is, without telling me which opinion you have. Do you have an opinion as of right now?

A. No.

Transcript at 792-793.

JUROR NO. 8—*Mrs. Jessie M. Parks*

Q. During the process of thinking about it and before you went through the process of thinking less and less about it, did you form any opinion as to the guilt or innocence of Mr. Yount?

A. Well, truthfully I can say this. I felt this way about it. You know they say there's two sides to every story. Like they say, our Courts are here until the man is proved guilty or innocent and I felt this way—and in a lot of ways it didn't jibe with me and in a lot of ways it did. I can't say he's guilty or I can't say he isn't guilty and that's what my opinion is. I'm not saying yes or no. But I felt that I wouldn't want to be on the jury but then I felt—if it was my duty and I would be called I would do the best of my ability but here is Judge Cherry this morning—his summation of it. I can't exactly say in his words—either you have to prove whether he is guilty or whether he isn't. If you can remember what you said when you talked—I'm sorry—what I mean—you can say well he is, but when you get to thinking can you truly say until you actually know. When the trial was on I didn't read any of it and I didn't get up the assumption to say he's guilty and I can't say he isn't guilty. It's just the same thing

and—but so—that's the way I feel about it. Now as far as my opinion which you want, well, I would definitely have to hear it before I could say one way or other. If I'm selected that's okay and if you don't think I'm qualified that's okay too.

Transcript at 814.

JUROR NO. 9—*Albert I. Undercoffer*

Q. Well, taking all of these factors into consideration as you have Mr. Undercoffer, would you give it a little bit of thought now and tell me whether or not you have an opinion as of right now, just based upon what you know and have heard and thought about. Do you have an opinion as of right now as to his guilt or innocence?

A. No. I think I would have to hear the testimony of both sides and I think I would form my opinion after I hear the testimony of both sides.

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A. It's a little bit like the Court, if somebody makes a statement in Court, the Judge would say, strike that from the record. The jury would be supposed to forget about that. It would be a very difficult thing to do.

Q. It sure is. We have been trying to battle that one for years.

A. I believe for myself—I believe that I could. I would be capable of rendering a fair decision on what I had heard here. I have faith enough in myself.

Transcript at 857-858.

JUROR NO. 10—*Robert P. Murphy*

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. No I have not.

Q. May I assume then Mr. Murphy, if you were selected as a juror you could go into the jury box and base your verdict solely on the testimony and evidence along with the instructions that the Judge would give you?

A. That's true.

Q. And that you would carry no opinion with you into the jury box?

A. No.

Transcript at 922.

JUROR NO. 11—*Irene Kurtz*

Q. Have you formed an opinion as to the innocence or guilt of this defendant?

A. No.

Q. If you were selected to sit as a juror, would you be able to base your verdict solely—only on the testimony and evidence you would hear and the instructions the Judge would give you?

A. Yes.

Q. And that no prior information or idea you may have would enter into your deliberation?

A. No.

Transcript at 988.

JUROR NO. 12—*John T. Harchak*

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. No I haven't.

Q. Mr. Harchak, if you were selected as a juror in this case, would you be able to enter the jury box and base your verdict of guilty or innocent only on the evidence and testimony that you would hear along with the instructions that the Judge would give you?

A. Yes.

Q. And you would have no other influencing factors in arriving at your verdict?

A. No, other than the testimony I would hear in this Court Room.

Transcript at 1119.

These responses not only meet the test of *Murphy* and *Martin* but refute petitioner's assertion that he failed to obtain a fair and "indifferent" jury in Clearfield County. Moreover, his assertion of substantial community bias and presumptive prejudice is belied by the record. The state court initially summoned seventy-three prospective jurors. The trial judge excused fifty-six for cause and Yount exercised nine peremptory challenges. The Commonwealth exercised one peremptory challenge and four jurors were seated, after one seated juror was excused due to a death of a family member. These percentages are not remarkable to anyone familiar with the difficulty in selecting a

homicide jury in Pennsylvania¹ and we find neither an abuse of discretion nor a constitutional violation when the trial judge determined to summon additional jurors while denying Yount's motions to change venue.

The trial court and counsel interrogated an additional sixty-eight citizens, or one hundred forty-one in total, before a jury was selected. Twenty-three peremptory challenges had been exercised. Extensive latitude was granted during voir dire to ascertain the "Mental attitude of appropriate indifference." *Irvin v. Dowd*, 366 U.S. at 724-25, 81 S.Ct. at 1643-1644, and we find nothing in the pretrial publicity, or the responses of the citizens who were excused for cause, or the number of such recusals, or the attitudes of the jurors who were seated, that leads to the conclusion that the venire was presumptively prejudiced so as to require a change of venue. We hold that petitioner has failed to sustain his burden of proving that the trial court committed constitutional error when it denied the motions to change venue. Petitioner has failed to establish that community bias prevented the selection of an impartial jury in Clearfield County in contravention of the Fourteenth Amendment.

C.

Petitioner's final argument relates to the trial court's decision to deny certain challenges for cause thereby requiring the accused to exercise peremptory

¹ As was done here, Pennsylvania law requires individual voir dire beyond the presence of other jurors; under oath; recorded; and with the participation of the court and counsel. Pa.R.Crim.P. 1106.

challenges. We find no constitutional infirmity in this regard.

Irene Kurtz and John T. Harchak were seated as jurors after Yount had exhausted his discretionary challenges. But as we have noted, a challenge for cause with respect to both jurors was not constitutionally required. Kurtz stated that she maintained no opinion as to guilt, and further that she was able to decide the case solely upon the evidence presented. Transcript at 988. The testimony of Harchak is to the same effect. Transcript at 1119. The decision of the trial judge was a discretionary function and did not implicate the Fourteenth Amendment.

Petitioner also urges that a challenge for cause was constitutionally required with regard to potential jurors Marcia Polkinghorn, James F. Decker, Marie E. Richardson and Ruth I. Hudson. None of these persons were seated as jurors but Yount claims that he was required to utilize discretionary challenges due to the trial court's erroneous rulings.

Marcia Polkinghorn testified that she had an opinion of guilt following publication of the prior adjudication. Transcript at 755-56. Further that she would "try" to defer her opinion in deference to the law and facts presented in court. Transcript at 764. James Decker indicated that he was of the mind that Jon Yount was guilty. Transcript at 898, 900. But he also testified that he would "try the case solely on the evidence and law." Transcript at 901. Marie Richardson observed that she had no opinion as to guilt, Transcript at 957, but she preferred not to serve due to anxiety as well as a recent death in the family. Transcript at 964. Finally, Ruth Hudson responded

that she had a fixed opinion of guilt, Transcript at 1113, but she also testified that she was willing and able to set aside her opinion and base a verdict solely upon the evidence. Transcript at 1113-1114. Yount's challenges for cause were denied in each instance.

None of these citizens sat in judgment of the facts because the accused exercised one of the twenty peremptory challenges provided by Pennsylvania law. In addition, no authority is required for the precept that the grant or denial of a challenge for cause is a discretionary function of the trial judge. Only when an accused is denied a fair and impartial tribunal is the Fourteenth Amendment implicated. We find no such violation here.

The decision of the judge to deny a cause challenge to Marie Richardson was proper. Physical capacity to serve is a judicial decision and not one to be left to the judgment of an individual juror. The trial judge found that Richardson was capable of serving on a sequestered jury and we perceive no constitutional error in that ruling.

The denial of petitioner's challenges for cause as to Polkinghorn, Decker and Hudson did not violate the Fourteenth Amendment even if we may disagree with those rulings. First, the trial judge granted challenges for cause prior to and following the interrogation of these prospective jurors. *See* Transcript at 1161. Second, Yount retained additional peremptory challenges following the no cause rulings concerning all three prospective jurors. Third, petitioner exercised a peremptory challenge to Margaret Rokosky, Transcript at 1138, after he exercised a similar challenge as to Ruth Hudson. And fourth, the jurors

and alternates who were seated after petitioner had exhausted his peremptory challenges met the test of *Murphy v. Florida*, 421 U.S. 794, 799-803, 95 S.Ct. 2031, 2035-2037, 44 L.Ed. 2d 652 (1974) and *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981). We hold that petitioner has failed to sustain his burden of proving the substantive elements of his claim.

In sum, we hold the petitioner, Jon Yount, has failed to establish that: (1) excessive and biased pretrial publicity prevented a fair trial; (2) substantial and undue community bias required a change of venue; and (3) the trial court erred when it denied several challenges for cause. Petitioner's exhausted state claims assail, in part, the factual findings of an experienced trial judge and an appellate jurist of renown. We find an absence of convincing evidence to contradict their findings and we further hold, based on an independent review of the record, that petitioner has failed to establish that this state court judgment is violative of the Due Process Clause of the Fourteenth Amendment.

A written order will follow denying the petition for habeas relief with prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-234

JON E. YOUNT,

Petitioner,

vs.

EARNEST S. PATTON, Superintendent, SCI - Camp
Hill, and HARVEY BARTLE III, ATTORNEY
GENERAL OF THE COMMONWEALTH OF PENN-
SYLVANIA,

Respondents.

ORDER OF COURT

AND NOW, this 22nd day of April, 1982,

IT IS ORDERED that the petition of Jon E.
Yount for writ of habeas corpus be and hereby is
denied with prejudice.

(s) Donald E. Ziegler
Donald E. Ziegler
United States District Judge

COMMONWEALTH of Pennsylvania,
Appellee,

v.

Jon E. YOUNT, Appellant.

SUPREME COURT OF PENNSYLVANIA.

Jan. 24, 1974.

[455 Pa. 303, 314 A.2d 242]

Before JONES, C. J. and EAGEN, O'BRIEN,
ROBERTS, POMEROY, NIX and MANDERINO, JJ.

OPINION OF THE COURT

ROBERTS, Justice.

In October of 1966, a jury found appellant guilty of the crimes of murder in the first degree and rape. A sentence of life imprisonment was imposed. On appeal, this Court reversed the judgment of sentence and granted a new trial because appellant's rights, as mandated by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), were violated. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969) cert. denied, 397 U.S. 925, 90 S.Ct. 918, 25 L.Ed. 2d 104 (1970).

On retrial in November, 1970, a jury again found appellant guilty of murder in the first degree,¹ and the penalty was again fixed at life imprisonment. Post-trial motions were denied and this direct appeal followed.² We now affirm.

On April 28, 1966, the body of Pamela Sue Rimer, an eighteen year-old high school student, was discovered in a wooded area near her home in Luthersburg, Pennsylvania. One of her stockings was knotted and tied around her neck. An autopsy revealed that death was caused by strangulation. Further examination disclosed three slashes across the victim's throat and cuts of the fingers of her left hand, inflicted by a sharp instrument, and numerous wounds about her head, caused by a blunt instrument.

At approximately 5:45 a. m. on the morning of April 29, 1966, appellant, a teacher at the school the deceased had attended, voluntarily appeared at the state police substation in DuBois, Pennsylvania, and rang the doorbell. An officer opened the door and asked whether he could be of assistance. Appellant stated, "I am the man you are looking for." The officer asked whether he was referring to the "incident in Luthersburg," and appellant responded in the affirmative.

The officer then asked appellant to come into the police station and be seated. Leaving appellant unat-

¹ Appellant's motion to quash the indictment for rape was granted, and the second trial was for the crime of murder alone.

² Jurisdiction attaches by virtue of the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, art. II, §202(1), 17 P.S. §211.202(1) (Supp. 1973).

tended, the officer proceeded to a back bedroom where a detective and another police officer were sleeping, woke them, and informed them that "there was a man in the front that said we are looking for him." He then returned to the front office where appellant, who had removed his coat, hat, and gloves, identified himself as Jon Yount.

After dressing, the detective and the second officer entered the front office. The detective was told by the first officer that appellant's name was Jon Yount. The detective then asked appellant to be seated inside a smaller office adjacent to the front office, where he asked, "Why are we looking for you?" Appellant replied, "I killed that girl." Upon hearing that answer, the detective inquired, "What girl?", and appellant responded, "Pamela Rimer."

In response to the detective's next question, "How did you kill this girl?", appellant answered, "I hit her with a wrench and I choked her." At that point the detective gave appellant admittedly inadequate *Miranda* warnings, and began interrogation as to the details of the crime. A written confession was subsequently obtained.

Prior to appellant's second trial, the question "How did you kill this girl?" and its answer, as well as the written confession were suppressed, on the authority of our prior decision, *Commonwealth v. Yount*, supra, as violative of *Miranda*. The admissibility of appellant's initial statements that the police were looking for him in connection with the Luthersburg incident is not challenged, nor could a challenge be successful. See *Commonwealth v. Miller*, 448 Pa. 114, 121 n.2, 290 A.2d 62, 65 n.2 (1972).

Appellant does contend, however, that the court erred in not suppressing his statement, "I killed that girl," and his identification of the victim as "Pamela Rimer." It is argued that these two admissions were the product of "custodial interrogation" and therefore should have been preceded by *Miranda* warnings. Appellant argues that warnings were required *before* the question "Why are we looking for you?" was asked.³ We are asked to determine the precise time when the need for *Miranda* warnings arose. It is now beyond question that "'whenever an individual is questioned while in custody or while the object of an investigation of which he is the focus, before any questioning begins the individual must be given the warnings established in *Miranda*....'" *Commonwealth v. D'Nicuola*, 448 Pa. 54, 57, 292 A.2d 333, 335 (1972) (quoting *Commonwealth v. Feldman*, 432 Pa. 428, 432, 248 A.2d 1, 3 (1968)). Accord, *Commonwealth v. Simala*, 434 Pa. 219, 225, 252 A.2d 575, 578 (1969); see *Commonwealth v. Hamilton*, 445 Pa. 292, 285 A.2d 172 (1971).

It is, however, only that questioning which is interrogation initiated by law enforcement officers which calls for *Miranda* warnings. *Miranda v. Arizona*, supra at 444, 86 S.Ct. at 1612, 16 L.Ed. 2d 694. As this Court held in *Commonwealth v. Simala*, supra at 226, 252 A.2d at 578: "[I]t is not simply custody plus 'questioning,' as such, which calls for the

³ In our prior decision, a new trial was granted because the written confession admitted into evidence was not preceded by warnings satisfying *Miranda*. The question of the admissibility of the two statements here challenged, not being necessary to our earlier decision, was not there decided.

Miranda safeguards but custody plus police *conduct* ... calculated to, expected to, or likely to, evoke admissions.' " The rationale behind this holding is found in *Miranda*, where the Court stated: "Confessions remain a proper element in law enforcement.... The fundamental import of the privilege ... is not whether [an individual] is allowed to talk to the police without the benefit of warnings and counsel, *but whether he can be interrogated*. There is no requirement that the police stop a person who enters a police station and states that he wishes to confess to a crime.... Volunteered statements of any kind are not barred by the Fifth Amendment.... " *Miranda v. Arizona*, supra at 478, 86 S.Ct. at 1630 (emphasis added).

Clearly, "any question likely to or expected to elicit a confession constitutes 'interrogation' under *Miranda*.... " *Commonwealth v. Simala*, supra at 227, 252 A.2d at 579. Accord, *Commonwealth v. Mercier*, 451 Pa. 211, 214, 302 A.2d 337, 339 (1973). But "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda v. Arizona*, supra at 478, 86 S.Ct. at 1630, 16 L.Ed. 2d 694.

On this record it cannot be said that the two police inquiries here challenged constitute conduct calculated to, expected to, or likely to elicit an incriminating response, or that they were asked with an intent to extract or an expectation of eliciting an incriminating statement. All this record establishes is that the detective knew only that a man named Jon Yount—a name which the detective had never heard before—voluntarily came to the police station early in the morning and volunteered that the police were

looking for him. In response to this information, the detective extemporaneously asked, "Why are we looking for you?" Appellant was not coerced, prompted, or urged to incriminate himself. To the contrary, the detective's inquiry, made in response to information volunteered by appellant, was of a neutral character and not interrogative.

Appellant's answer, "I killed that girl," was given freely and without compelling influence. It was therefore volunteered in the constitutional sense. That the answer was in fact incriminating does not alter its volunteered character nor preclude its use. *Miranda v. Arizona*, supra at 478, 86 S.Ct. at 1630, 16 L.Ed. 2d 694.

Similarly, we are of the opinion that the statement identifying "that girl" as "Pamela Rimer" was volunteered. Appellant, without any compulsion, went to the substation and volunteered that he had killed "that girl." As we indicated in *Commonwealth v. Simala*, supra at 226 n.2, 252 A.2d at 579 n.2, after an incriminating, but ambiguous, statement is volunteered, as was done here, a question which does not do "anything more than clarify statements already made," in the absence of any coercion or prompting, subtle or overt, is permissible. See also *Kamisar*, "'Custodial Interrogation' Within the Meaning of *Miranda*," in *Institute of Continuing Legal Education, Criminal Law and the Constitution—Sources and Commentaries* 335, 354 (1968).

Here, immediately upon hearing appellant's volunteered statement, "I killed that girl," the detective spontaneously asked, "What girl?" By this he sought only to clarify appellant's prior statement. Ap-

pellant responded, "Pamela Rimer." Such a clarifying inquiry, made in response to a statement volunteered by appellant during an interview which he initiated, is proper. The identification must be deemed constitutionally volunteered. Accord, *State v. Perry*, 14 Ohio St.2d 256, 237 N.E.2d 891 (1968); *People v. Mercer*, 257 Cal.App.2d 244, 64 Cal.Rptr. 861 (1967); see *Hicks v. United States*, 127 U.S.App.D.C. 209, 382 F.2d 158 (1967).

As already indicated, appellant volunteered both that he had killed someone and the victim's identity. Because "[v]olunteered statements ... are not barred by the Fifth Amendment," *Miranda v. Arizona*, supra at 478, 86 S.Ct. at 1630, their use as evidence was constitutionally permissible.

However, after these statements were given, *Miranda* warnings became necessary. *Commonwealth v. Yount*, supra at 280, 256 A.2d at 466; see *Commonwealth v. Feldman*, 432 Pa. 428, 248 A.2d 1 (1968); *Commonwealth v. Jefferson*, 423 Pa. 541, 226 A.2d 765 (1967). Appellant's initial admission and identification created the critical moment after which interrogation without *Miranda* warnings was impermissible. It was the absence of warnings at that moment, and not before, that required our prior reversal. The earlier, volunteered statements, however, were not the product of interrogation initiated by the police.⁴

⁴ In light of our determination that appellant's statements were volunteered, we need not determine, as the Commonwealth argues, whether appellant was then in "custody." See *Commonwealth v. Marabel*, 445 Pa. 435, 283 A.2d 285 (1971).

On this record, therefore, it must be concluded that the Commonwealth satisfied its burden of proving by a preponderance of the credible evidence that the two statements here challenged were constitutionally permissible evidence. *Commonwealth v. Ravenell*, 448 Pa. 162, 292 A.2d 365 (1972); Pa.R.Crim.P. 323(h), 19 P.S. Appendix.

Appellant raises ten additional assignments of error. These need be discussed only briefly.

Appellant contends that the trial court erred in refusing his timely motions for a change of venue, and advances three arguments in support of this position. First, it is asserted that excessive pretrial publicity prevented a fair trial. In responding to this argument, the trial court observed: "The first of the trials occurred in 1966, and as pointed out herein, the second one occurred in 1970. As the record will indicate there was practically no publicity given to this matter through the news media in the meanwhile except to report that a new trial had been granted by the Supreme Court. It is to be noted also that throughout the second trial there was practically no public interest shown in the trial; one thing to be noted is that on some days there being practically no persons present even to listen to it...." These findings, fully supported by the record, do not sustain appellant's claim, and the court properly denied appellant's motion for a change of venue predicated on this theory. *Commonwealth v. Pierce*, 451 Pa. 190, 303 A.2d 209, cert. denied, 414 U.S. 878, 94 S.Ct. 164, 38 L.Ed. 2d 124 (1973); *Commonwealth v. Johnson*, 440 Pa. 342, 269 A.2d 752 (1970).

Second, appellant contends that the excusing of a large number of veniremen for cause, and the nature of the answers of those so excused, conclusively demonstrated substantial community bias and prejudice which required a change of venue. Nothing in this record, however, refutes the court's assertion that it liberally granted appellant's challenges for cause "to assure that there could be no complaint about the final jury empanelled." Neither does the voir dire, as appellant argues, reveal a "clear and convincing" build-up of prejudice or a "'pattern of deep and bitter prejudice' shown ... throughout the community" which would require a change of venue. *Irvin v. Dowd*, 366 U.S. 717, 725, 727, 81 S.Ct. 1639, 1644, 1645, 6 L.Ed. 2d 751 (1961). See *Commonwealth v. Hoss*, 445 Pa. 98, 103-07, 283 A.2d 58, 61-63 (1971); *Commonwealth v. Swanson*, 432 Pa. 293, 248 A.2d 12 (1968), cert. denied, 394 U.S. 949, 89 S.Ct. 1287, 22 L.Ed. 2d 483 (1969).

Third, it is argued that the Act of March 18, 1875, P.L. 30, §1, 19 P.S. §551 (1964), mandated a change of venue. This Act states, inter alia:

"In criminal prosecutions the venue may be changed, on application of the defendant ...

.

... When, upon second trial of any felonious homicide, the evidence on the former trial thereof shall have been published within the county in which the same is being tried, and the regular panel of jurors shall be exhausted without obtaining a jury."

The Act, however, by its own terms, is directed to the sound discretion of the trial court. As this Court established in *Commonwealth v. Karmendi*, 328 Pa. 321, 337-338, 195 A. 62, 69 (1937): "The act is not mandatory; it lies within the sound discretion of the court below: *Com. v. Cleary*, 148 Pa. 26, 23 A. 1110, but in a particularly notorious case in a given community, this court will review that discretion, and if in its judgment it is felt the accused could not help but be prejudiced in her subsequent trial by the feeling engendered, a new trial will be granted...." See also *Commonwealth v. Sacarakis*, 196 Pa. Super. Ct. 455, 175 A.2d 127 (1961). Although the regular panel of jurors was in fact exhausted before the jury was selected,⁵ this circumstance alone obviously does not require a change of venue. It cannot be said that the court abused its discretion where, as here, the record fails to disclose undue community prejudice.

Similarly, we reject appellant's argument that, during voir dire, the court erred in denying certain challenges for cause. Our reading of the testimony of the challenged jurors satisfies us that the trial court

⁵ Indeed, the exhaustion of the initial array is not an unusual occurrence. As Dean Laub observed: "It sometimes happens that there are so many disqualified or excused jurors that the array is not large enough to permit the completion of a particular civil or criminal panel. This extraordinary situation is frequently encountered during the selection of a panel in murder cases. In that type of case the large number of peremptory challenges allowed to each side, and the liberal allowance of causal challenges frequently exhausts the array or reduces it to the point where the trial cannot proceed until additional jurors have been summoned." 1 B. Laub, *Pennsylvania Trial Guide* §34.4 at 81 (1959).

correctly concluded that "even where a juror may have had any opinion in the matter, the jury was without prejudice and was able to and did arrive at its verdict on the testimony and the law involved." The record shows that none of the jurors had a fixed opinion as to appellant's guilt or innocence, or was otherwise legally unable to serve. See *Commonwealth v. Hoss*, supra at 107, 283 A.2d at 63-64; *Commonwealth v. Swanson*, supra at 299, 248 A.2d at 15; *Commonwealth v. McGrew*, 375 Pa. 518, 525, 100 A.2d 467, 470 (1953).⁶

Appellant also argues that all evidence seized during a search of his automobile should have been suppressed. He asserts that the search warrant relied upon by the police was issued without probable cause.

Before the time appellant appeared at the DuBois substation, another state policeman, working entirely separately and in a location different from the station

⁶ See also ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury §2.5 (Approved Draft, 1968). The Commentary to that section suggests:

"A challenge for cause to an individual juror may be made only on the ground:

(j) That the juror has a state of mind in reference to the cause or to the defendant or to the person alleged to have been injured by the offense charged, or to the person on whose complaint the prosecution was instituted, which will prevent him from acting with impartiality; but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the evidence." Id. 68-69.

to which appellant went, received from two witnesses a description of an automobile they had seen near where the victim's body was found. The witnesses reported that, at about the time the murder was committed, the automobile passed their home headed toward the scene, and that later it passed from the opposite direction traveling at high speed. That policeman, working only from this information, learned that one Jon Yount owned an automobile fitting the description.

After appellant admitted that he had killed Pamela Rimer, one of the officers at the substation reported that fact to the main police barracks. This collective knowledge, properly before the magistrate,⁷ constituted the requisite probable cause for the issuance of the search warrant. See *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *Commonwealth v. Hall*, 451 Pa. 201, 302 A.2d 342 (1973); *Commonwealth v. D'Angelo*, 437 Pa. 331, 263 A.2d 441 (1970). Since appellant's admission was not tainted we agree with the trial court that the subsequent search was not impermissible as the "fruit of a poisonous tree." *Commonwealth v. Marabel*, 445 Pa. 435, 444, 283 A.2d 285, 289 (1971); see *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963).

⁷ For purposes of establishing probable cause, the officer who obtained the warrant was entitled to rely on the information communicated to him from the DuBois substation. *United States v. Stratton*, 453 F.2d 36, 37-38 (8th Cir.), cert. denied, 405 U.S. 1069, 92 S.Ct. 1515, 31 L.Ed. 2d 800 (1972).

Appellant contends that a pocketknife found on his person when he was arrested was improperly admitted into evidence. As previously noted, the victim suffered cuts of the neck and fingers, and appellant was arrested about twelve hours after the commission of the crime. The knife was of a kind that could have inflicted the wounds, even though the prosecution was unable conclusively to demonstrate that the particular knife was the weapon used. Its relevance cannot be successfully challenged. "The fact that the accused had a weapon or implement suitable to the commission of the crime charged, such as a knife ... is always a proper ingredient of the case for the prosecution." 1 Wharton's Criminal Evidence §157 at 289-90 (13th ed. C. Torcia 1972).

This relevant evidence clearly was admissible. As this Court recently held in *Commonwealth v. Ford*, 451 Pa. 81, 84, 301 A.2d 856, 857 (1973): "[P]ositive testimony that the knife in question was actually the murder weapon is not required prior to introduction into evidence.... If a proper foundation for admission of the evidence has been laid, as here, then admission into evidence is permissible.... The fact that the knife could not be positively identified affects the weight of such evidence, but not its admissibility...."*

* See also 1 Wharton's Criminal Evidence §211 at 441-42 (13th ed. C. Torcia 1972) (footnotes omitted):

"It is relevant to show that the defendant owned or had access to an implement with which the crime could have been committed.

The possession by the defendant of a weapon or implement of crime is relevant even though there is no evidence

Here, not only was the knife a possible murder implement, but it was found upon the person of the appellant at a time "reasonably proximate to the commission of the crime." 1 Wharton's Criminal Evidence §211 at 442 (13th ed. C. Torcia 1972). A foundation sufficient to support the admission of the knife was laid. Its evidentiary use was therefore a proper element in the prosecution's case.⁹

Appellant assigns as error the admission of certain photographs of decedent and several items of her clothing, including the knotted stocking which was one of the murder weapons. It is well-settled law in this Commonwealth that "the admission of photographs exhibiting the body of a deceased in homicide cases is primarily within the discretion of the trial judge...." *Commonwealth v. Powell*, 428 Pa. 275, 278, 241 A.2d 119, 121 (1968). Moreover, this Court has repeatedly declared that "the proper test to be applied by a trial court in determining the admissibility of photographs

that it was used in the commission of any particular crime, but there must be evidence that some crime was committed.

The possession or ownership of the weapon or implement of crime must be reasonably proximate to the commission of the crime. If too great a period has elapsed between the commission of the crime and the period of possession or ownership, the evidence would be too remote and hence inadmissible. Thus, in a prosecution for assault with intent to kill, the admission in evidence of the finding of a weapon on the person of the accused when he was arrested, nearly a month after the assault, was prejudicial error."

⁹ Appellant also contends that he was entitled to an instruction that the knife had no evidentiary value. Because the knife was correctly admitted, appellant's point for charge was properly refused.

in homicide cases is whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.... " Id. at 278-79, 241 A.2d at 121. Accord, *Commonwealth v. Ford*, supra at 86, 301 A.2d at 858; *Commonwealth v. Eckhart*, 430 Pa. 311, 317, 242 A.2d 271, 274 (1968). This test is also applicable to the other demonstrative evidence, i. e., the clothing, admitted here. See *Commonwealth v. Ford*, supra at 85, 301 A.2d at 858.

It is to be noted that the stocking was one of the murder implements. The paramount evidentiary need for this item is obvious. As to the other challenged items, the court found, and we agree that "[t]he photographs aided in the jurors' [sic] understanding of the type of injuries inflicted, where and how the deceased was found, the site and position of the deceased, and in very definite corroboration of the oral testimony of witnesses.... " Moreover, the court stated that "the photographs were [not] at all inflammatory [sic]," and there is no suggestion that the victim was, for example, pictured naked, or that the photographs or items of clothing were gruesome or grotesque.¹⁰ On this record, we hold that the court correctly applied the *Powell* test, that the evidentiary value of the admitted evidence outweighed any potential for prejudice, and that the court did not abuse its discretion in admitting the challenged items.

Appellant also argues that the trial court erred in denying his motion to sequester the Commonwealth

¹⁰ We also note that the court in its discretion did not allow these allegedly inflammatory items into the jury room.

witnesses, particularly the state police officers. This Court has previously held that "the question of sequestration of witnesses is left largely to the discretion of the trial Judge and his decision thereon will be reversed only for a clear abuse of discretion." *Commonwealth v. Kravitz*, 400 Pa. 198, 218, 161 A.2d 861, 870 (1960), cert. denied, 365 U.S. 846, 81 S.Ct. 807, 5 L.Ed. 2d 811 (1961); see Pa.R.Crim.P. 326.

In its opinion the court justified its denial of the motion, by explaining that "no witness was called who had not previously testified at the first trial; and examination of all the testimony will indicate that it was much as was given at the first trial of this case." These witnesses were not sequestered at the first trial. The record also establishes that the same police officers who testified at trial also testified a few weeks earlier at the suppression hearing. No request to sequester was then made. We find the court's reasons for refusing to sequester the officers convincing, and find no abuse of discretion.

It is also argued that the trial court variously erred in its instructions to the jury. Only one of these now-asserted challenges, however, was properly raised by specific objection before the jury retired to deliberate. That objection alone can now be reviewed. *Commonwealth v. Watlington*, 452 Pa. 524, 306 A.2d 892 (1973); Pa.R.Crim.P. 1119(b). The objection is to an allegedly improper expression of the court's opinion that the evidence did not warrant a verdict of voluntary manslaughter.¹¹

¹¹ Appellant also argues that the court overemphasized the crime of murder in the first degree, and that it did not, while

The trial court expressed the view that if the jury found that appellant did in fact maliciously kill decedent, the court recalled no evidence of extenuating circumstances which would reduce the act to voluntary manslaughter. The court, however, also gave the jurors a full, complete, adequate, and correct charge on voluntary manslaughter, and instructed them that voluntary manslaughter was an entirely permissible verdict. The trial judge also specifically instructed the jurors that their recollection of the testimony, and not his, controlled, that his opinion was no more than a gratuitous observation, and that the jury could and should return any verdict it felt justified. Moreover, the court did not express an opinion as to guilt or innocence or suggest that the jury return any particular verdict. The charge, read in its entirety, removed nothing from the province of the jury nor did it contain any judicial expression of guilt. The charge therefore was proper. *Commonwealth v. Archambault*, 448 Pa. 90, 290 A.2d 72 (1972); *Commonwealth v. Motley*, 448 Pa. 110, 289 A.2d 724 (1972); see *Commonwealth v. Miller*, 448 Pa. 114, 124-26, 290 A.2d 62, 67-68 (1972).

Appellant complains that the court erred in denying his motion for a mistrial based on allegedly inflammatory and prejudicial remarks by the prosecutor in his closing argument.¹² We are satisfied, as was the

reviewing the evidence, sufficiently stress the jury's role as fact-finder.

¹² It is contended that the prosecutor improperly commented on the gravity of the crime charged, that the inferences he drew from the evidence tended toward the speculative, and that he improperly defended, after appellant had attacked, the competence of the state police.

trial court, that the prosecutor's remarks were limited to the facts in evidence and the legitimate inferences therefrom, and consequently cannot be deemed improper. See *Commonwealth v. Goosby*, 450 Pa. 609, 301 A.2d 673 (1973); American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function §5.8 (Approved Draft, 1971).

Finally, appellant contends that if the oral admission, the pocketknife, the clothing and photographs, and the items seized from appellant's automobile were improperly before the jury, then the remaining evidence could not sustain any verdict of guilty. Since we have determined that those items of evidence were properly admitted, this challenge must fail. Reviewing all the record evidence in the light most favorable to the Commonwealth, we are satisfied that the jury reasonably could have found, beyond a reasonable doubt, all the elements of murder in the first degree, and that the evidence therefore is sufficient to sustain the verdict. *Commonwealth v. Lee*, 450 Pa. 152, 154, 299 A.2d 640, 641 (1973).

Judgment of sentence affirmed.

POMEROY, J., concurs in the result.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5372

JON E. YOUNT, Appellant

vs.

ERNEST S. PATTON, SUPERINTENDENT, SCI-
CAMP HILL, and HARVEY BARTLE III, AT-
TORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA

(D. C. Civil No. 81-234)

*On Appeal from the United States District Court for
the Western District of Pennsylvania*

Present: HUNTER and GARTH,* Circuit Judges, and
STERN, District Judge**

JUDGMENT

This cause came on to be heard on the record
from the United States District Court for the Western

* Judge Garth took part in oral argument and in conference
in this case. Thereafter he became ill. He will file a separate
opinion at a later date.

** Honorable Herbert J. Stern, United States District Judge
for the District of New Jersey, sitting by designation.

District of Pennsylvania and was argued by counsel December 17, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 22, 1982 be, and the same is hereby affirmed insofar as the order of said District Court held that petitioner's constitutional right against self-incrimination was not violated by the admission into evidence of his oral statements, vacated insofar as it held that retrial in Clearfield County did not infringe petitioner's right to a fair trial by an impartial jury, and the cause remanded to the District Court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth shall afford petitioner a new trial.

ATTEST:

(s) Sally Mrvos
Clerk

May 10, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5372

JON E. YOUNT, Appellant

vs.

ERNEST S. PATTON, SUPERINTENDENT, et al

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 30, 1983.

(s) James Hunter
Circuit Judge

Dated: May 25, 1983

CERTIFICATE OF SERVICE

I hereby certify that on the twenty-seventh day of June, 1983, one copy of the Petition for Writ of Certiorari was mailed by certified, first class mail, postage prepaid, to George E. Schumacher, Esquire, Federal Public Defender, 590 Centre City Tower, 650 Smithfield Street, Pittsburgh, PA 15222. I further certify that all parties required to be served have been served.

(s) Thomas F. Morgan
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District Attorney of Clear-
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DEC 16 1983

ALEXANDER L. STEVAS.
CLERK

VOLUME I—Pages 1a-278a

No. 83-95

In the Supreme Court of the United States

October Term, 1983

**ERNEST S. PATTON, Superintendent, SCI—CAMP HILL,
and HARVEY BARTLE, III, Attorney General of the Com-
monwealth of Pennsylvania,**

Petitioners,

v.

JON E. YOUNT,

Respondent.

**On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit**

JOINT APPENDIX

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**Petition for Certiorari Filed June 29, 1983.
Certiorari Granted October 17, 1983.**

TABLE OF CONTENTS

PAGE

VOLUME I:

Docket Entries—United States District Court for the Middle District of Pennsylvania	1a
Docket Entries—United States District Court for the Western District of Pennsylvania	3a
Docket Entries—United States Court of Appeals for the Third Circuit	12a

PROCEEDINGS IN THE COURTS OF PENNSYLVANIA:

Transcript of Hearing:

Vera K. Krapf:

Voir Dire Examination	18a
---------------------------------	-----

Blair Hoover:

Voir Dire Examination	29a
---------------------------------	-----

Clair Clapsaddle:

Voir Dire Examination	40a
---------------------------------	-----

John Yorke:

Voir Dire Examination	53a
---------------------------------	-----

Mary Jane Waple:

Voir Dire Examination	66a
---------------------------------	-----

James F. Hrin:

Voir Dire Examination	80a
---------------------------------	-----

Martin R. Karetski:

Voir Dire Examination	96a
---------------------------------	-----

Julia C. Hummel:

Voir Dire Examination	116a
---------------------------------	------

Omar H. Ives:	
Voir Dire Examination	136a
Mrs. Jessie M. Parks:	
Voir Dire Examination	146a
Albert I. Undercoffer:	
Voir Dire Examination	160a
Robert P. Murphy:	
Voir Dire Examination	173a
Irene Kurtz:	
Voir Dire Examination	189a
John T. Harchak:	
Voir Dire Examination	206a
David J. Chincharick:	
Voir Dire Examination	229a
LaVerne B. Pyott:	
Voir Dire Examination	245a
Memorandum and Order, Sept. 21, 1970	259a
Memorandum and Order, Nov. 14, 1970	262a
Opinion, County Court, Jan. 15, 1973	267a
Order	276a
VOLUME II:	
Opinion, Supreme Court of Pennsylvania, Jan. 24, 1974	277a
PROCEEDINGS IN THE FEDERAL COURTS:	
Motion To Proceed in Forma Pauperis	295a
Affidavit of Poverty	296a
Petition for Writ of Habeas Corpus	297a
Answer to Petition for Writ of Habeas Corpus ..	310a
Petitioner's Traverse to Respondents' Answer to Petition for Writ of Habeas Corpus	336a

Order, April 16, 1981	349a
Amendment to Petition for Writ of Habeas Corpus	350a
Answer to Amendment to Petition for Writ of Habeas Corpus	359a
Petition To Dismiss Petition for Writ of Habeas Corpus	393a
Transcript, Hearing, November 3, 1981, United States District Court, on Petition for Writ of Habeas Corpus:	395a
Petitioner's Evidence:	
Homer W. King, Esq.:	
Direct Examination	401a
Cross-Examination	434a
Redirect Examination	449a
Recross-Examination	452a
Caroline Yount:	
Direct Examination	454a
Cross-Examination	464a
Redirect Examination	469a
Constance Ives:	
Direct Examination	472a
Cross-Examination	475a
James V. Wade:	
Direct Examination	477a
Jon E. Yount:	
Direct Examination	482a
Cross-Examination	513a
Redirect Examination	514a

Petitioner's Exhibits:

P-1-a—Newspaper Article, April 29, 1966 . .	520a
P-1-b—Newspaper Article, April 30, 1966 . .	529a
P-1-d—Newspaper Article, May 3, 1966 . . .	533a
P-1-f—Newspaper Article, September 19, 1966	542a
P-1-g—Newspaper Article, September 26, 1966	544a
P-1-h—Newspaper Article, September 27, 1966	552a
P-1-i—Newspaper Article, September 28, 1966	557a
P-1-j—Newspaper Article, September 29, 1966	565a
P-1-k—Newspaper Article, September 30, 1966	574a
P-1-l—Newspaper Article, October 1, 1966 .	583a
P-1-m—Newspaper Article, October 3, 1966	591a
P-1-n—Newspaper Article, October 4, 1966	598a
P-1-o—Newspaper Article, October 5, 1966	607a
P-1-p—Newspaper Article, October 6, 1966	617a
P-1-q—Newspaper Article, October 7, 1966	623a
P-1-r—Newspaper Article, October 8, 1966	631a
P-1-s—Newspaper Article, October 10, 1966	639a
P-1-t—Newspaper Article, October 11, 1966	640a
P-1-v—Newspaper Article, June 30, 1969 . .	642a
P-1-w—Newspaper Article, July 1, 1969 . . .	643a
P-1-x—Newspaper Article, July 5, 1969 . . .	644a

VOLUME III:

P-1-y—Newspaper Article, July 10, 1969 . . .	645a
P-1-z—Newspaper Article, Sept. 8, 1969 . . .	646a
P-1-aa—Newspaper Article, Oct. 27, 1969 . .	648a
P-1-bb—Newspaper Article, Dec. 6, 1969 . .	649a
P-1-cc—Newspaper Article, Feb. 25, 1970 . .	650a
P-1-dd—Newspaper Article, March 9, 1970 . .	651a
P-1-ee—Newspaper Article, May 7, 1970 . . .	652a
P-1-ff—Newspaper Article, May 15, 1970 . .	653a
P-1-gg—Newspaper Article, Sept. 22, 1970 . .	654a
P-1-hh—Newspaper Article, Sept. 30, 1970 . .	655a
P-1-ii—Newspaper Article, Oct. 7, 1970 . . .	655a
P-1-jj—Newspaper Article, Oct. 27, 1970 . .	656a
P-1-kk—Newspaper Article, Nov. 3, 1970 . .	657a
P-1-ll—Newspaper Article, Nov. 4, 1970 . . .	658a
P-1-mm—Newspaper Article, Nov. 5, 1970 . .	658a
P-1-nn—Newspaper Article, Nov. 6, 1970 . .	661a
P-1-oo—Newspaper Article, Nov., 1970 . . .	662a
P-1-pp—Newspaper Article, Nov., 1970 . . .	663a
P-1-qq—Newspaper Article, Nov. 10, 1970 . .	664a
P-1-rr—Newspaper Article, Nov. 12, 1970 . .	666a
P-1-ss—Newspaper Article, Nov. 13, 1970 . .	667a
P-1-tt—Newspaper Article, Nov. 14, 1970 . .	667a
P-1-uu—Newspaper Article, Nov. 16, 1970 . .	669a
P-1-vv—Newspaper Article, Nov. 17, 1970 . .	670a
P-1-ww—Newspaper Article, Nov. 18, 1970 . .	672a
P-1-xx—Newspaper Article, Nov. 19, 1970 . .	673a
P-1-yy—Newspaper Article, Nov. 20, 1970 . .	674a
P-1-zz—Newspaper Article, Nov., 1970 . . .	677a

P-1-aaa—Newspaper Article, Nov. 23, 1970	678a
P-1-bbb—Newspaper Article, Dec. 1, 1970	679a
P-1-ccc—Newspaper Article, Oct. 6, 1981	681a
P-1-ddd—Newspaper Article, Oct. 10, 1981	682a
P-1-eee—Newspaper Article	683a
P-1-fff—Newspaper Article	685a
P-1-ggg—Newspaper Article	685a
Plaintiffs Exhibit No. 5—Newspaper Article, Oct. 6 and 10, 1981	687a
Transcript, Hearing, December 28, 1981, United District Court, Before Robert Mitchell, United States Magistrate:	689a
Respondent's Evidence:	
Hon. John A. Cherry:	
Direct Examination	690a
Cross-Examination	700a
Redirect Examination	710a
Recross-Examination	710a
Hon. John K. Reilly, Jr.:	
Direct Examination	712a
Cross-Examination	719a
Francis V. Sebino, Esq.:	
Direct Examination	722a
Cross-Examination	734a
Redirect Examination	738a
Recross-Examination	739a
Magistrate's Report and Recommendation	744a
Order, February 12, 1982	769a
Respondent's Objections to Magistrate's Report and Recommendation	770a

Amendment to Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus	778a
Order, March 31, 1983	781a
Opinion, United States District Court, April 22, 1982	783a
Order, United States District Court, April 22, 1982	809a
Order, April 23, 1982	810a
Motion To Supplement the Record	811a
Order, May 21, 1982	828a
Answer to Motion To Supplement the Record ..	829a
Order, June 21, 1982	831a
Notice of Appeal	832a
Opinion, United States Court of Appeals for the Third Circuit	833a
Judgment, United States Court of Appeals for the Third Circuit	892a
Petition for Writ of Certiorari	894a
Respondent's Brief in Opposition	906a
Order Allowing Certiorari	917a

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

81 234 CA

Plaintiffs

YOUNT, JON E.

Defendants

BARTLE, HARVEY III

Attorney General of the Commonwealth of Penn-
sylvania

Cause

28 USC 2254 Petition for Writ of Habeas Corpus

Attorneys

Jon E. Yount,

C-8297

P.O. Box 200

Camp Hill, Pa. 17011

DATE NR PROCEEDINGS

1981

Jan. 8-1-MOTION—for leave to proceed in forma
pauperis and AFFIDAVIT OF POVERTY—of
petitioner, and PETITION—for writ of habeas
corpus, and BRIEF—of petitioner in support of
petition for writ of habeas corpus. JFG

2a *Docket Entries — District Ct. M.D. Pa.*

- Jan. 8—2—CERTIFICATE—of Authorized Officer of Institution stating that the petitioner has 34.80 in his account. JFG
- Jan. 8—J.S. 5. Copy to Judge Nealon.
- Jan. 15—3—REPORT OF MAGISTRATE—it is respectfully recommended that petitioner be permitted to commence this action in forma pauperis and that the same be transferred to the United States District Court for the Western District of Pennsylvania. (RAY) Copies to petitioner from WB. and Sec jfg
- Jan. 15—4—NOTICE—Exceptions to the report of the Magistrate must be filed within 15 days of the date of this report. Copies to petitioner from WB. and Sec jfg
- Feb. 10—5—ORDER—of Court, ... the court agrees that this action should be pursued in the Western District of PA. The recommendation of the Magistrate is therefore adopted. WHEREFORE, IT IS ORDERED, that this case be transferred to the US District Court for the Western District of PA. (N) Copies to petitioner and Mag. Durkin from N.-sec. copy in vault.
- Feb. 10—CASE FILE—transferred to W.D. of PA pursuant to order of Court dated 2/10/81 with c.c. docket entries and c.c. order re transferral. File consists of 5 documents.
- Feb. 10—J.S. 6

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

81-234

PLAINTIFFS

CASE CLOSED

JON E. YOUNT

DEFENDANTS

ERNEST S. PATTON, Superintendent,

SCI—CAMP HILL, and

HARVEY BARTLE III, Attorney General of the
Commonwealth of Pennsylvania

Cause

28 USC 2254—Prisoner petition for writ of
habeas corpus (Transferred from MD of PA)

ATTORNEYS

Pro Se:

John E. Yount, C-8297, Box 200, Camp Hill, Pa.
17011

Federal Public Defender, 590 Centre City
Towers, Pgh, Pa. 15222

F. Cortez Bell, Asst D.A., P O Box 887, Clear-
field, Pa. 16830, for Comm. of Pa., Bartle.

☒ Check here if case was filed in forma pauperis
Filing Fee M. D. of Pa—IFP—no fee

DATE NR PROCEEDINGS

1981

Feb. 12—1—Following papers received by transfer from MD of PA and filed:

Certified copy of docket entries,

Petition for writ of habeas corpus and motion for leave to proceed in forma pauperis (original and 2 copies),

Certificate of amount in prison account,

Report of Magistrate Durkin recommending permission to petitioner to commence action in forma pauperis and transfer of action to the WD of PA,

Notice of Magistrate Durkin,

Certified copy of Order of Chief Judge, dated 2/10/81, adopting the recommendation of the Magistrate and directing transfer to WD of PA.

Feb. 12—Receipt for the file sent to MD of PA.

Feb. 18—2—Rule to show cause issued directing that after answer filed, Clerk to Secure state court records relative to No. 357 Jan. Term 1973 in Ct. Common Pleas of Clearfield County, Pa.; within 20 days of service, respondent and D. A. to file answer, Service of petition and this rule be made upon Atty Gen. of Comm. of Pa., D.A. of Clearfield County and respondent by US. Marshal, costs by U.S. (Mgt. Mitchell)

Feb. 18—5 cc of order and 3 copies of H.C. petition forwarded to Marshal for service

Mar. 3—3—Rule and order of 2/18/81 ret. served on D.A. of Clearfield County 2/27/81 by cert mail dated 2/24/81; on Atty Gen of Comm. of Pa. 2/26/81 by cert mail dated 2/24/81

- Mar. 16-4-Praecipe for appearance of counsel for Bartle, Comm. of Pa. filed.
- Mar. 16-5-Petition to extend time with proposed order filed
- Mar. 17-Order entered on petition filed 3/16/81 extending time for Comm. of Pa. to plead to 10 days (Mgt. Mitchell)
- Mar. 23-6-Petition's response to Commonwealth's petition for extension of filing to answer petition for writ of habeas corpus.
- Mar. 25-7-ANSWER to petition for Writ of H.C. filed.
- Mar. 25-Letter to Clearfield County Court for State Court records
- Apr. 6-8- Traverse to respondents' answer to writ of habeas corpus filed by petitioner.
- Apr. 14-State Court records rec'd from Clearfield County (*Huge* brown box)
- Apr. 16-9-Order entered appointing Federal Public Defender to represent pltf; matter set for conf. of counsel 4/30/81 at 10 (Mgt. Mitchell)
- Apr. 30-10-Order entered granting leave to file amended petition for writ of H.C.; upon filing of amended petition, D.A. to file answer; within 60 days, petitioner to file brief; within 20 days thereafter, DA. to file his brief (Mgt. Mitchell)
- May 29-11-Motion for permission to file amended petition for Writ of H.C. filed by pltf with pro/order

6a *Docket Entries - District Ct. W.D. Pa.*

- May 29 - Order entered on motion filed 5/29/81 permitting pltf. to file amended petition for H.C. by 7/1/81 (Mgt. Mitchell)
- July 1 - 12 - Amendment to petition for Writ of Habeas Corpus filed with proposed order
- July 30 - 13 - Motion for permission to file amended answer to petition for H.C. filed by defts with proposed order
- July 31 - Order entered granting motion to amend answer, same to be filed by 8/15/81 (Mgt. Mitchell)
- Aug. 17 - 14 - Answer to amendment to petition for writ of habeas corpus filed by defts.
- Aug. 31 - 16 - Petition to dismiss petition for Writ of H.C. filed by defts
- Sept. 17 - Order entered fixing hearing on H C. for 11/3/81 at 10; U.S. Marshal to Produce Pltf for hearing; costs by U.S. (Mgt. Mitchell)
- Sept. 18 - H.C. writ issued for Pltf.
- Oct. 21 - 17 - Motion filed and order entered directing petitioner shall issue the requested subpoenas and subpoenas duces tecum and that said subpoenas shall be served by U.S. Marshal or representative of Fed Public Defenders Office directing individuals named in the Schedules attached to this motion to be present before court - Mitchell, J. 11/3/81 to testify for pltf at 10; further that motion schedule subpoenas and this order be sealed and that only U.S. Marshal or Fed Public Defender office be permitted to view and utilize said motion, etc; costs by U.S. (Mgt Mitchell)(cc to Marshal; Fed Publ Def to serve)

- Oct. 21 - Pursuant to motion and order, doc 17
Gilbert W. Conley, Clerk
- Nov. 2 - 18 - Motion for service of subpoena and subpoena duces tecum together with order granting same, Mitchel, Mag. and directing that the document be sealed. Sealed envelope #2
- Nov. 3 - 19 - Hearing on Petition for writ of H.C. held before Mag. Mitchell, memo filed. (Rep. T. Thomas)
- Nov. 4 - 20 - Marshal form 285 returned served on Homer W. King, Esq. on Nov. 2, 1981, filed.
- Nov. 13 - 21 - Habeas Corpus petition returned served on Nov. 3, 1981 filed.
- Nov. 17 - Answer to motion for hearing filed by pltf
- Nov. 25 - 22 - Order entered directing Writ issue for pltf for supplemental hearing 12/28/81 at 10: costs by U.S. (Mgt Mitchell)
- Nov. 25 - Writ of H.C. issued for pltf.
- Dec. 1 - 23 - Transcript of hearing on petition for Writ of H.C. 11/3/81 before Mitchell filed (Rep. T. Thomas)
- Dec. 9 - 24 - CJA 24 voucher for payment of transcript for preparing brief of Pltf. in support of petition for writ of Habeas Corpus filed and approved by Mg. Mitchell in sum of \$304.00 and forwarded by Ct. reporter for payment
- Dec. 17 - 25 - Motion for issuance of subpoenas filed by pltf. with proposed order

8a *Docket Entries — District Ct. W.D. Pa.*

Dec. 18—Order entered on motion filed 12/17/81 directing pltf. shall issue subpoenas for Homer W. King, Esq. and Francis V. Sabino, Esq., same shall be served by U.S. Marshal, to be present for hearing on 12/28/81; costs by U.S. (Mgt. Mitchell)(cc issued)

Dec. 29—26—Continued Hearing on evidence held 12/28/81 before Mitchell, Magt. Memo filed (Rep. M. Cutright) (Tape #2-#4, Index 0-8)(Non-jury trial)

1982

Jan. 12—27—Transcript of continued evidentiary hearing held 12/28/81 before Mitchell filed (Rep. M. Cutright).

Jan. 14—28—H.C. of 11/25/81 ret. exec 12/28/81.
CJA24

Jan. 22—29—Copy 3 authorization and voucher for payment of transcript by M. Cutright for pltf. and approved by Mitchell J. in sum of \$136.00

Feb. 12—30—Mag's Report & recommendation filed (Mag. Mitchell).

Feb. 12—31—Order entered directing parties have 10 days in which to file objections to report & recommendation (Mag. Mitchell).

Feb. 22—32—Respondent's objections to Mgt report and recommendation filed.

Feb. 24—33—Motion for Bail filed by pltf pending H. C. petition with proposed order.

Feb. 25—34—Affidavit in support of Motion for bail filed by pltf.

- Mar. 2-35-Supplement to motion for bail filed by pltf. with proposed order.
- Mar. 4-36-Answer to motion for Bail filed by defts.
- Mar. 15-37-Amendment to petition for Writ of Habeas Corpus and amended petition for writ of Habeas Corpus filed by pltf with proposed order.
- Mar. 15-38-Notice fixing hearing on petition for writ of H.C. for 3/23/82 at 2:30 filed.
- Mar. 31-39-Hearing on petition for writ of habeas corpus held before Ziegler, J. CAV (Rep. F. Jones).
- Mar. 31-Order entered on amendment filed 3/15/82 directing certain portions as stated in this order, of pltf's petition for writ of Habeas Corpus and amended pet. excluded from the allegations made (Ziegler, J.)
- April 22-40-Opinion filed and order entered denying petition for writ of habeas corpus with prejudice (Ziegler, J.)
- April 22-Pursuant to Opinion filed and order entered petition for writ of habeas corpus is hereby denied with prejudice. Gilbert W. Conley, Clerk.
- April 22-Notices mailed.
- April 23-41-Order entered granting certificate of probable cause; issues are not frivolous (Ziegler, J.)
- May 21-42-Motion to supplement the record filed by pltf thru counsel with proposed order.

10a *Docket Entries - District Ct. W.D. Pa.*

May 21-43-Notice of appeal filed by pltf. thru counsel from order of 4/22/82 (No Fees- inapplicable)

May 21-CC of notice of appeal, cc of docket entries, copy of IFP granted in M. D. of Pa., copy of IFP granted this district, copy of opinion and order of 4/22/82 and copy of order granting CPC mailed U.S. Ct. of Appeals; copy of notice to Judge Ziegler, deft counsel Rep. T. Thomas, M. Cutright, F. Jones).

May 21-44-Order entered directing that those articles appearing in newspapers of general circulation prior and subsequent to the 3/31/82 hearing be made part of record; further that any and all correspondence received by court also be made part of record (Ziegler, J.)

June 3-45-Transcript purchase order filed by U.S. Fed Public Defender advising transcript already on file.

June 9-Pro se litigant defended by Public Defender and case complete for appeal purposes, original record, exhibits and State Court records and 2 sealed envelopes and 3 copies 1 certified of docket entries mailed U.S. Ct. of Appeals.

June 17-46-Answer to motion to supplement record with proposed order filed.

June 21-Order entered on Answer filed 6/17/82 granting that record is supplemented by addition of articles appearing in newspapers of general circulation prior and subsequent to 3/31/82 hearing (Ziegler, J)

June 21 - Doc. 46 mailed Circuit as 1st supp

June 28 - Letter from Ct of Appeal advising appeal docketed at 82-5372.

June 28 - Receipt for original record rec'd from Ct of Appeals.

June 28 - Receipt for list of exhibits rec'd from Ct. of Appeals (exhibits & State court records.

Jul 2 - Receipt for 1st supplement from ct appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 82-5372

Related Cases 83-5607, Calendared for: 12-17-82

Origin: Dist. of PA-Pittsburgh, Docketed: 6/24/82

DC Docket No. 81-234, [☐] Fee Paid [☐] IFP [☒] CJA

DC Judge Donald E. Ziegler, [☐]CPC Granted _____

Filed in DC 2-12-81

NOA Filed 5-21-82, Disclosure Applt. 7/8/82

Case Type Civil – Prisoner Petition for Writ of Habeas
Corpus Statement Appee. 7/7/82; 7/15/82

Title of Case

Jon E. Yount,

Appellant

vs.

Ernest S. Patton, Superintendent, SCI – Camp Hill,
and Harvey Bartle III, Attorney General of the Com-
monwealth of Pennsylvania

Appearances

Appellant/Petitioner: George E. Schumacher
7/8/82, Federal Public Defender, 590 Centre City
Tower, Pittsburgh, PA 15222, (412) 644-6565 FTS

722-6565 [Civil – Court Appointed – Federal Public Defender – 6/24/82]

Appellee/Respondent: F. Cortez Bell, III – member – 7/7/82, Assistant District Attorney, Office of the District Attorney, P. O. Box 887, Clearfield, PA 16830, (814) 765-9669.

Thomas F. Morgan – member – 7/15/82, District Attorney, Office of the District Attorney, P. O. Box 887, Clearfield, PA 16830, (814) 765-9669

Record, Exhibits & Brief Information/Filing:

6-24-82 – Record on Appeal [] IMPOUNDED

3 envelopes sealed in USCA Safe.

6-24-82 – 1st Supp. Record.

8-15-83 – 2nd Supp. Record.

9-1-83 – 3rd Supp. Record.

6-24-82 – Exhibits [x] EX. RM. [] SAFE w/Transcripts & St. Ct. Record 62 boxes)

6-24-82 – Briefing Notice Issued.

8/2/82 – Brief for Applt. MS 8/2/82

9/1/82 – Brief for Appee. MS 9/1/82 (25 cc)

9/16/82 – Reply B. for Applt. MS 9/16/82

8/2/82 – Appendix MS 8/2/82 (2 vol. 4cc)

12/6/82 – Appellee's Appendix – Received further information of the court.

Argued/Submitted 12/17/82

Panel Hunter & Garth, C.J. & Stern, D.J.

Opinion May 10, 1983 [xx] Signed

MO Hunter

Judgment, See page two for complete entry.

Mandate Stayed To: 6/30/83-Order of 5/25

Further Stayed To: 7/30/83-Order of 7/7/83

Certiorari filed 6/29/83 [xx] Granted 10-17-83 S.C.
#83-95 Reported at 710 F2d 956 (83)

Date 1982 Filings – Proceedings

Sept. 9 – Motion by appee. to file 7 ccs. of brief,
w/svc., filed.

Sept. 27 – Order (Clerk) granting above mot. w/filing
as of the date of this order, filed.

Dec. 6 – Letter dated 12-3-82 from George E. Schu-
macher, Esq., cnsl for aplt, rec'd. at direction of
Ct.

Oct. 22 – Clk's letr to cnsl for aplt written at direction
of Ct. requesting statement of jurisd, statement as
to whether this case has prev been before this Ct.
& whether there are any previous, pending or an-
ticipated appeals arising out of same proceeding.

Oct. 22 – Clk's letr to cnsl for aplees written at direc-
tion of Ct. requesting statement of subject matter
jurisdiction, statement of basis on which this Ct.
has appellate jurisdiction, statement as to whether
this case has previously been before this Ct. &
whether there are any previous, pending, or an-
ticipated appeals arising out of same proceeding,
cc of judgment appealed from, statement of stan-
dard or scope of review to be used by Ct. in this
matter.

1983

May 10, 1983—Judgment affirming insofar as the order of said District Court held that petitioner's constitutional right against self-incrimination was not violated by the admission into evidence of his oral statements, vacated insofar as it held that retrial in Clearfield County did not infringe petitioner's right to a fair trial by an impartial jury, and the cause remanded to the District Court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth shall afford petitioner a new trial, filed.

May 20—Motion by Appellees for stay of mandate in order to file petition for writ of certiorari to and including June 30, 1983, filed. (w/serv)

Jun 10—Corrected. Opinion (*Hunter, & Garth*, Circuit Judges and Stern, District Judge*)-Corrected majority opinion filed May 10, 1983 together with Judge Stern's Concurring opinion and also Judge Garth's concurrence incorporated in the judgment opinion. *sitting by designation.

June 29—Motion by appellees to extend the issuance of the mandate, filed. w/serv.

**PROCEEDINGS IN THE COURTS OF
PENNSYLVANIA**

[35]

. . .

VERA K. KRAPF called by the Clerk.

BY MR. HILL: Juror look upon the defendant; defendant look upon juror.

Q. You do swear by almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. REILLY:

Q. How long have you lived in Clearfield?

A. It was four years and four months on July 1, of '66. Four years and four months now.

Q. And how many children do you have?

A. Three.

Q. What are their ages?

A. Thirty, thirty-seven, and 20.

Q. Do they live in this area?

A. The youngest goes to college in Clarion and this is her home and the other two live away. One in Greensburg and one in Berwick.

[36] Q. Mrs. Krapf, are you acquainted with the defendant Jon Yount?

A. No, I never have.

Q. Have you ever met him?

A. No I never have.

Q. Or any members of his family?

A. No.

Q. Do you know any of his attorneys seated at counsel table, Mr. Blakley, Mr. King, or Mr. Sabino?

A. No, I don't know them at all.

Q. Mrs. Krapf, have you formed a fixed opinion as to the guilt or innocence of this defendant?

A. Through the years I've heard so many—it's hard to tell what my own is, but do you want me to tell you what it is?

Q. No. If you were selected as a juror in this case would you be able to determine your vote at the end of the trial solely on what you heard from the witness stand and from what the Court told you the law is?

A. I believe I could. I feel it's almost impossible when you have heard opinions given for several years.

Q. But you feel you could base your verdict solely on the law and evidence that would be presented at this trial?

A. I certainly would do my best.

BY MR. REILLY: Pass the Juror.

BY MR. KING:

Q. Mrs. Krapf, I don't know if Mr. Reilly asked you—what does [37] your husband do?

A. He's a Methodist Minister two blocks down, the church that burned two years ago.

Q. While that's being restored is he preaching someplace else?

A. No, our parish house wasn't burned so we are having all our activities in the parish house. We're a little cramped but we are carrying on.

Q. Did you tell us where your children work?

A. The oldest one is in Greensburg, and the second one is a Minister in Berwick, Pennsylvania and the youngest one is in Clarion College.

Q. The one in Greensburg—

A. She is married to a man that works in McKeesport and she herself is a public school teacher.

Q. Have you read any newspaper articles or magazines about Mr. Yount?

A. Yes I have through the years from time to time and I have heard it discussed by others and actually I couldn't have helped but have somewhat of an opinion because of what has been discussed and read prior to my receiving this notice.

Q. Have you ever been called or served as a juror before?

A. I was called last December for traverse jury but all cases had been settled out of Court so we didn't get in on them. One other time I was called but I moved; my husband's work was transferred so I was no longer eligible so this is the first time I came to this point.

[38] Q. Do you know any members of the Rimer family?

A. Not to my knowledge. Here in Clearfield?

Q. In Clearfield or around Luthersburg?

A. No, we are not acquainted at all in the Clearfield area until we came here four years and four months ago.

Q. Where did you come from?

A. Emporium, we were there five years and seven years in Holidaysburg, before that six years in Altoona.

Q. Do you know Mr. Reilly?

A. Just by sight. This is the first time I've been this close.

Q. He's not a member of your husband's church?

A. No.

Q. The gentleman to his right, Mr. Fennell?

A. I don't know him.

Q. Are you acquainted with any members of the State Police?

A. Not personally. I have called a couple times about road conditions but I have never known them personally.

Q. They all hear from us about that now and then. Mrs. Krapf, due to what you have read and conversations you've heard or discussions you have heard concerning Mr. Yount, do you personally have a fixed opinion as to his guilt or innocence?

A. From what I have read and heard discussed with—nothing I volunteered, but you hear it discussed in groups in churches and stores and so forth, and they seem to feel and I've heard this opinion—I felt he had a fair trial and was given a just sentence.

[39] Q. Then may I take it that you do have a fixed opinion as to his guilt as was—

A. As was disclosed during the—over the years—as I recall, it happened in the Fall of '66 and we had only been here just a short time when this occurred and people discussed it and through the years people have discussed it.

Q. And you feel you are of the opinion, as I understand then, that he was guilty and you have the opinion he is still guilty?

A. So far as any evidence that I heard discussed was always the same—other people, and not knowing anything about it except hearsay and reading the paper it seemed it was a just sentence to me and a fair trial and I felt at the time—I was glad he didn't get the electric chair, and I definitely am opposed to capital punishment if that should be involved in this.

Q. But you do have a fixed opinion as to his guilt based upon these various reasons you have given?

A. Yes. Granted, it was only one sided because I never heard the other side. But if capital punishment is an issue to be involved, I definitely am opposed to capital punishment. I know there are—

Q. Were you going to add something?

A. We are told from time to time, and especially with a girl in college—they have these sociology

courses and we study and sometimes it sounds that's the best thing to do but when you come down to thinking of yourself as one of twelve people of which they would vote for capital punishment, I'm sure I couldn't send anybody to [40] death because I think every human being has the possibility of becoming—in the church we say to be converted—and being a changed person under the right circumstances and might be able to do good with his life even if spent in prison, but I think he could do good as long as he was in prison but not if he was gone so I would not favor capital punishment. I would favor other punishment.

Q. When you say after he was gone—

A. After he was put to death—I don't even know if that is involved here. Before I was notified a number of people said he won't get any worse than he got. The trial was to get more leniency. I probably don't know. But on capital punishment I would vote no.

Q. You would vote no. You would not impose—

A. I would not be one to say he gets the death sentence because that is not in my power for him to give up his life.

Q. This duty, do you feel because your husband is in the ministry?

A. Probably because we work with all kinds of people who make mistakes and one of the purposes of Christianity is to give them another chance—those who have made mistakes, even though we know they're wrong—maybe they could do right if they had the right background—was—was—and also the right opportunities to improve.

Q. Mrs. Krapf, even though the law says, and the Judge would instruct you, that a person accused of a crime is not required to take the stand and to testify in his own behalf, would you be influenced by the failure of an accused to take the witness stand and testify?

[41] A. To testify in his own behalf?

Q. Yes. Would the fact that he did not do that, would that influence you, maybe against him?

A. No, I don't think so. You've heard so much about civil rights lately. A Man doesn't have to. He isn't required to testify against himself any more than a husband and wife are required to testify against his mate.

Q. Mrs. Krapf, is there anything in your home situation personally, due to the fact that your husband is a Minister and you obviously work with him, is there anything in that situation that would make it awkward or difficult, extremely so that is, for you to serve for perhaps a protracted period of time as a juror?

A. Well, I do a lot of work in Church. Mr. Manos back there can vouch for that. I teach Sunday School and help with all the activities of the Church.

Q. Would it—the question is, whether or not your situation at home would work a great hardship on you and your husband if you were not to be at home for a period of time.

A. One or two days, or what, or don't you know?

Q. I really can't say, but since you are familiar with the other procedure that was involved here, we were here about two weeks.

A. I wasn't here. I didn't serve as a juror.

Q. You asked me how long a period I was talking about and I said I don't know but you said you were familiar with the previous proceeding involving Mr. Yount and I merely was telling you we were [42] here for two weeks on the last proceeding.

A. I didn't know the time of it.

Q. Now my question is whether or not—I'm not telling you we'll be here two weeks—I don't know. My question is, is there anything in your home situation or your husband being in the Ministry which would make it hard or difficult if you were away for a time—for a period of time?

A. It would be quite an inconvenience because of various things coming up.

Q. Such as to make it impossible for you to be away for a period of time?

A. I guess it wouldn't make it impossible but it would be a little unhandy. I have company coming and a couple weddings coming up and duties of that nature.

Q. Would your presence in serving as a juror create a difficulty in your parish?

A. Why yes—when people heard my name was on for this—countless people of the church have come to me and said they hoped I would take—the stand I would take in case I was called. I have had a prejudice built up from the people in the church.

Q. Is this prejudice, has it been adverse to Mr. Yount?

A. Yes it was. They all say he had a fair trial and he got a fair sentence. He's lucky he didn't get the chair.

BY MR. REILLY:

We object to any questions about what prejudice was involved, if [43] there is a prejudice, but questions as to which direction it lies is inadmissible and we would object.

BY THE COURT:

I think he was entitled to the answer.

BY MR. REILLY:

But he asked if they were adverse to the defendant—

BY THE COURT:

I believe he asked her that to find out if she would be adversely effected by being on this jury because of that prejudice. I think it is entirely proper—I would overrule the objection.

BY MR. KING:

Q. To further clarify what we've been talking about and what the Court has pointed out, do I understand people in your church have strong feelings about this matter and have attempted to influence you along those lines and, therefore, do you feel that whatever you did on this jury would be subject to some criticism and do you feel that this would effect your fair and impartial, what would be an otherwise fair and impartial judgment?

A. I think so because having had this for four years on and off and more recently all the time.

Q. Do you feel, notwithstanding the Court would instruct you to put aside everything from your mind except what occurred in the Court Room, that you would still have that fear in the back of your mind or apprehension of what your parishioners would say to you later on because of your service. Is that the way you feel?

[44] A. I am afraid so. I would try to be fair and eliminate everything I have ever heard about it. I would try, but whether I could—it would be pretty difficult.

Q. We are sure you would, but you do feel you would be subject to these other pressures and possible retributions and that fear would effect your judgment?

A. Yes because I believe it would be there.

Q. Have I fairly stated the position—to try and help you tell us how you would actually feel and think, notwithstanding the instructions of the Court?

A. I would try to accept that but to say I could dismiss all that has been told and felt—and the church people—I haven't asked for any of this but they discuss it in every group—but they say now since you are chosen and you will be there we expect you to follow through—

Q. Notwithstanding what the Court would tell you, you feel you would be subject to the retributions or retaliation of these people—

A. I think I would hear about it.

Q. This would therefore, effect your ability to comply with the Court's instructions. Is that correct?

A. I'm not sure, but I think it would be there.

BY MR. REILLY:

Q. Do I understand your testimony that if you were a juror in this case, following the close of the case and the Judge's Charge, that is his instructions to you as a juror, you would make, you would [45] base your verdict solely on the evidence you heard and the Charge that the Judge would give—you would make every effort to do that?

A. I would make every effort yes, but I'm not sure I could eliminate everything I heard before.

Q. But you would make an effort to do that?

A. I would try to be as fair as I could.

BY MR. REILLY:

We would accept this juror.

BY MR. KING: Challenge for cause.

BY THE COURT:

Challenge for cause is granted.

BY THE COURT:

We will now grant a ten minute recess. 11:05
a.m.

11:15 Court re-convened.

. . .

[61]

. . .

BLAIR HOOVER called by Clerk.

BY MR. HILL:

Juror look upon the prisoner; prisoner look upon the juror.

Q. You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. KING:

Q. Where do you live Mr. Hoover?

A. At Morrisdale, R D, located between Lanse and Crass Flat.

Q. And are you married?

A. Right.

[62] Q. What does your wife do?

A. She's just a housewife.

Q. Do you have any children?

A. One.

Q. How old?

A. Fifteen.

Q. Boy or girl?

A. Girl.

Q. What does she do?

A. Goes to school.

Q. And what school does she attend?

A. West Branch Area School.

Q. By whom are you employed Mr. Blair—I'm sorry, Mr. Hoover?

A. I'm employed by Pennsylvania Funds Company of Philadelphia.

Q. What kind of organization is that—just briefly?

A. That is an investment company of mutual funds—I am a mutual funds salesman you would say.

Q. Do you do that around here—meaning in Clearfield County or do you work in other counties and out of State?

A. I work basically in Clearfield and Center Counties but I do go over the State of Pennsylvania but I do not go out of the State.

Q. Do you know Jon Yount?

A. I have never met the man in any way.

Q. Do you know any members of his family?

A. No.

[63] Q. Do you know a family by the name of Rimer from around Luthersburg?

A. No.

Q. How long have you lived at your present address?

A. All my life.

Q. Can you—Mr. Hoover give me an idea where Morrisdale is?

A. Yes, I say it's located—are you acquainted—do you know where Kylertown is?

Q. Kylertown?

A. Do you know where Exit 21 is on Interstate 80?

Q. Generally.

A. I'm really, it's at the lower end of the County. I'm just about a mile from the border of Center County on the Eastern edge and if you've been on Interstate 80—do you know where the large bridges are that cross over from Center to Clearfield—I can sit on my porch and look at those bridges. This will give you close enough.

Q. Sort of in the Southeastern portion of Clearfield County?

A. Right.

Q. Are you acquainted with Mr. Reilly or Mr. Fennell?

A. I just know them from in here at Clearfield.

Q. When you say you know them—have you ever been served by them in their legal capacity?

A. No.

Q. Or have they ever been customers of yours?

A. No.

Q. Have you ever attended social engagements with them or belonged [64] to the same clubs or club to which they belong?

A. Not that I know of.

Q. I gather you are not a Kiwanian?

A. No, not here in Clearfield I'm not—some of my organizations I belong to are in Philipsburg rather than in Clearfield.

Q. Now, do you know anything about Mr. Yount or have you read anything about Mr. Yount?

A. Well, it was pretty hard to be here in Clearfield County and not read something in the paper—that is, some newspaper articles. Yes, I have read some things in the paper about it.

Q. And have you read any magazines?

A. Not that I recall as magazines.

Q. Did you hear any radio or television stories or broadcasts about him?

A. I couldn't help that either here in the County.

Q. Have you had occasion to hear Mr. Yount's matter discussed by other people?

A. Yes, as I say, being around people you can't help but hear this.

Q. Have you heard other people express opinions as to his guilt or innocence?

A. Oh, definitely.

Q. Do you have any kind of fixed opinion as to his guilt or innocence?

A. On this question I would have to hear both sides—the facts—before I feel that I could express a true opinion.

Q. The question was, Mr. Hoover, whether or not you have an opinion [65] now, at this time?

A. No.

Q. No opinion at all?

A. No.

Q. Did you prior—

A. This is no opinion either way.

Q. You say you couldn't be around Clearfield County and not know all about this matter, is that right?

A. Right.

Q. And back at the time you heard these things and read these things, did you have an opinion?

A. Let's see. I would say that you'd come to some opinion, as far as just opinion on what you heard or what you may have read, but to me, as the way I've seen things in papers, in many papers, not to discredit any one paper, this don't say this is fact. So as far as forming a true opinion, I couldn't just do it by what I read. You'd read one thing and then another and somebody else would say something else. There was a lot of different opinions and I heard opinions both ways on it, in many different ways. Does that answer your question?

Q. It makes me think of a couple more.

A. Let me say this. If this would help you any, as I say, I heard as far as hearing—it wasn't one sided. I heard both ways so until you would know the true facts you couldn't—no one could come to a true opinion.

Q. People—you said you heard people express opinions to you who [66] did not have the benefit of any more knowledge than you had—isn't that true?

A. Right—this is it. That's why I couldn't come up with—or have a true opinion and, but let's say—in any one way—this is just hearsay. Same as in the paper—what you may read, which I don't recall reading anything out of a magazine at the time, but naturally there was things in our daily paper, but still—things have been distorted in papers and I came to the conclusion a long time ago, regardless of what it is, unless you have the bare facts yourself, you don't know what it is.

Q. Mr. Hoover, if you were to be asked to serve on a jury in this matter and the time element might be protracted, would this have any effect on your health or business life or your home life in any way?

A. Oh, this would depend on how long. It isn't that I couldn't serve on—I feel that I could serve on it—there would be naturally some things that no doubt would have to be changed until I got back home a little bit but that would be it—that's all I have to say—it would depend on the length of time.

Q. Are you telling us it would be inconvenient as for everybody—your business would not suffer too much or to such a point it would prohibit you from serving?

A. I can't see it right now for my business—I'm on commission—So, if I don't sell, I'm not just gonna be there, period.

Q. That's the point Mr. Hoover, would your business then be definitely effected by not being out there selling?

A. To a certain extent, yes.

[67] Q. Now, then, would that fact then, influence you or cause you to not be able to give as much attention to the matter at hand—say listening to a trial—would you be concerned and worried and affected by your inability to be producing, so as your judgment might be effected?

A. This to me—this would have no bearing on it.

Q. You were aware because you had read papers and heard discussions about Mr. Yount back at the other proceeding I think you told us, is that correct—since you are in the sales business and coming in contact with people all the time—this is your business—would the fact that you were to serve on a jury concerning this matter effect you business-wise so far as your relationship with your clients is concerned?

A. No, I don't think. That is, let me ask this question—I've never been involved like this and I don't—once we are in the jury box would I be able to talk to my wife as far as financial affairs or would I not?

BY THE COURT:

No. No contact with anyone except for emergencies—purposes of health and deaths and so forth.

BY MR. KING:

Q. You would not be able to run your business from the jury box, no.

A. I don't mean that but I thought—and—no, I still—as far as it is right now anyway, I don't. It shouldn't, it shouldn't hurt it, my business.

Q. The thing I am asking you about Mr. Hoover, is whether or not [68] your serving as a juror on this matter would subject you to perhaps criticism or even prejudice so far as your business clients are concerned and that being a fact would, therefore, your judgment be effected insofar as what verdict or judgment you might render if you sat as a juror?

A. No, I don't think. As far as criticism—this would—at least I haven't seen anything; in my own mind I don't feel this way unless it would be something that would turn up after it was all over or something like that, but to me, I feel that this would be no problem.

Q. You know your own clients Mr. Hoover and that's the reason I'm asking the questions. Do you think something you might do or decide would have an effect upon you later on to the effect that you will think about this in the meantime and effect your judgment in this matter?

A. No, if I'm gonna be in the jury box now or whenever it is, I'm gona have my mind on the work or I don't want to be there.

Q. Mr. Hoover, the Court will probably—would instruct you that the defendant has a right not to take the stand and is not required to testify in his own

behalf and from this you may not make any adverse inferences. Now would you be able to follow the Court's instructions and not hold it against an accused that he did not take the stand and testify in his own behalf. Would you be able to do that is my question?

A. Yes, I feel so.

[69] Q. Are you acquainted with any police officers or any members of any police enforcement agency? State Police or local Police?

A. I know them. They know me better than I know them but not real, what you would call close personal friends.

Q. You have no members of the State Police as clients or customers?

A. No.

Q. Or any local law enforcement agency?

A. No.

Q. Notwithstanding what you have read and heard concerning Mr. Yount, are you able to presume Mr. Yount innocent of any offense at this time?

A. Well, I feel any man or woman is innocent until proven guilty.

Q. My question is, do you feel that way concerning Mr. Yount at this time?

A. That would cover Mr. Yount too. I said any man or woman.

Q. You definitely have that feeling about Mr. Yount at this time—that he is innocent?

A. He would have to be innocent until proven guilty.

Q. And you feel that way at this time?

A. That's what I said.

Q. Do you know Mr. Charles Hoover?

A. Is that Charles Hoover from Morrisdale?

Q. That's what it says here in my little book, yes.

A. Yes, I know who you mean. He lives at Morrisdale. Now that's about 8 miles from where I live. I know the man.

[70] Q. Do you know William R. Hoover?

A. William R.?

Q. An insurance man who lives in Clearfield. Is he related to you?

A. No, and neither is Charles Hoover.

Q. Charles is not related either?

A. No.

Q. We have another one—what about Sandra Hoover?

A. Sandra Hoover—no. The only one I know there is Charles Hoover. I know him but no relation whatsoever—not even distant relation.

BY MR. KING: We pass the juror.

BY MR. REILLY:

Q. Are you acquainted with Mr. Blakley, Mr. King, or Mr. Sabino, the attorneys for the defendant?

A. No.

Q. You've never had occasion to engage their services in any legal matter which you may have had?

A. No.

BY MR. REILLY: Pass the Juror.

BY MR. KING:

Defense accepts the Juror.

BY MR. REILLY:

The Commonwealth accepts the Juror.

BY THE COURT:

You will kindly take your place in the jury box and there be sworn.

[71] BY MR. HILL:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania vs. Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. I do.

BY THE COURT:

Mr. Hoover, you are going to be conducted to a jury room and there you will remain until again called. You are going to be sequestered and, therefore, if you, and I am sure you must have, if you have any personal wants such as pajamas or things of that nature, please notify the Tipstaff, Mr. Thompson and make a list if you wish and he will call and have them

delivered to you. Your lunch will be served in the jury room today. The rest of the time you will be sequestered in a motel in DuBois and you will there be housed and fed during the course of this proceeding. I admonish you at this time and at all recesses—at all times, that you allow no one to talk to you about the case, that you not talk to anyone about the case and if anybody should talk about the case to you or within your hearing you are bound—and duty-bound to report the same to the Court.

You will now be taken to the jury room there to remain until further called.

This Court is now in recess until 1:30 o'clock.
12:12 p.m.

. . .

[203]

. . .

CLAIR CLAPSADDLE called by the Clerk.

BY MR. HILL:

Juror look upon the prisoner; prisoner look upon the juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer at the Great Day?

A. I do.

BY MR. SABINO:

Q. Mr. Clapsaddle, where do you live?

A. Grampian.

Q. Do you live right in Grampian or outside?

A. This side about three quarters of a mile.

Q. On the Clearfield side?

A. On the Clearfield side, yes.

Q. How long have you lived there?

A. All my life. Not there—in Penn Township all my life.

Q. Are you married?

[204] A. Yes sir.

Q. Do you have any children?

A. Five.

Q. Would you give us their ages and sexes?

A. Ages?

Q. Yes and sex.

A. The oldest is a girl, 36; the second one is a girl 36, not 36, 32; the boy next is 29; and, boy 28, and one girl 23.

Q. Are all your children married and living away or do some still live with you?

A. The youngest one is still with us.

Q. The youngest one is with you?

A. Yes sir.

Q. By whom are you employed?

A. I'm a construction worker. Right now I'm not employed by anybody.

Q. Is your wife employed?

A. No sir.

Q. Is your daughter who's still at home employed?

A. Yes sir.

Q. By whom?

A. Up here at McGregor's at Hyde City.

BY THE COURT:

That's sportswear.

BY MR. SABINO:

Q. Your older children, are they still living in this area?

[205] A. Two are and two live in Tonawanda, New York.

Q. The ones in this area, by whom are they employed?

A. Neither one employed. They're girls, neither one employed.

Q. Both are married?

A. Yes, housewives.

Q. And you are presently out of work?

A. Yes, right now.

Q. Do you know Jon Yount?

A. No I don't.

Q. Do you know any members of his family?

A. No I don't.

Q. Do you know any people that know Jon Yount?

A. None that I recall.

Q. Have you heard about Jon Yount and matters dealing with legal matters we are pertaining to here—have you ever read about these matters?

A. In the newspapers.

Q. When was that?

A. Well, not lately I haven't that I know of. It is possibly three or four years—a couple years ago—I don't know. I was working in Erie in '66, '67 and '68, so I don't remember too much when it was.

Q. I see. Have you ever heard any radio or television accounts or broadcasts dealing with Mr. Yount?

A. Well, I suppose I have heard some over the time. You could hardly miss it on the news.

[206] Q. Do you know the Rimer family from Luthersburg?

A. No I don't.

Q. Do you know any people that know the Rimers, that you are aware of?

A. No sir.

Q. Now, the material that you have read and heard—has it caused you to form any opinion concerning the guilt or innocence of Mr. Yount?

A. No, I don't believe too much in any respect of it, no. You know what I mean. Naturally some of it you do, yes.

Q. You have formed some opinion?

A. Well, yes.

Q. Now, is that opinion rather firm and fixed in your mind?

A. Well, I couldn't say it would be, no.

Q. Are you aware of a principle of law we have in Pennsylvania that says an individual who is accused of a crime is presumed innocent until proven guilty—are you aware of that?

A. Yes sir.

Q. Would your present opinion be such that you could accept that principle of law I just mentioned to you?

A. Yes I could.

Q. You could put your present opinion out of your mind and accept the general rule that Mr. Yount is presently presumed innocent until proven guilty?

A. That's the way it's suppose to be and..

Q. Assuming it is supposed to be one way—my question is, will you accept it?

[207] A. Yes.

Q. Would you?

A. Yes.

Q. Now Mr. Clapsaddle, do you have any other activities or avocations outside of work—are you involved in any other kinds of activities?

A. That depends on what you mean?

Q. Do you have any hobbies?

A. No, no hobbies.

Q. Do you belong to any clubs?

A. No sir.

Q. Do you come into contact with any numbers of people in your activities or are you generally around home all the time?

A. I'm usually around home when I'm not working.

Q. Have you ever discussed or talked to other people about Mr. Yount or his case?

A. Yes I have.

Q. When would that have been?

A. Possibly just recently maybe knowing this thing was coming up, that's all.

Q. You mean since you received the notice you would be a possible juror, you have had discussions with others?

A. No more than would be inside your own family because I always worked away from around home, among strangers.

Q. But among your family you have had discussions?

A. Yes.

[208] Q. With others, other than your wife?

A. Not that I know of, no.

Q. Has your wife expressed an opinion to you concerning Mr. Yount's guilt or innocence?

A. No, not that I remember.

Q. She's not expressed her opinion?

A. Not her opinion, no.

Q. Has she expressed anybody else's opinion to you?

A. No.

Q. Now, if you were to be on the jury in this case, the Court would instruct you that an accused need not take the witness stand in his own defense and if he did not take the witness stand, you would not be permitted to infer any guilt on his part by his failure to get on the witness stand. If that was to occur would you accept the Court's instructions?

A. Well yes.

Q. Would you be able to, assuming the defendant failed to take the witness stand, with the Court's instructions as I mentioned to you before, would it influence your thinking at all with respect to the guilt or innocence of Mr. Yount?

A. I don't believe, no.

Q. Is there any pressure that might be exerted on you by your friends or associates if you were to be a juror in this case?

A. No.

Q. Is there anything about your home life, your health or your [209] wife's health or your employment

that would prohibit or would be some detriment by your staying here for some time as a juror?

A. No, I'm not working so that wouldn't really matter.

Q. Did you have occasion to read the newspaper last night, Mr. Clapsaddle?

A. No I didn't.

Q. You did not?

A. I didn't read it at all.

Q. Since you have been here since yesterday morning, have you had occasion to discuss this case at all with people either out in the anteroom or at home?

A. No.

Q. Did you discuss the matter last evening with your wife when you got home?

A. None other than she asked me if I was picked and that was all that was said.

Q. Did she indicate she would have been happy or unhappy about that possibility?

A. No.

BY MR. SABINO:

We pass the Juror.

BY MR. FENNELL:

Q. Are you acquainted with Mr. David Blakley, one of the defendant's attorneys?

A. David Blakley?

Q. Yes.

[210] A. No.

Q. Are you acquainted with Mr. King or Mr. Sabino who's asking you the questions?

A. No.

Q. Do you believe you could, if chosen as a juror in this case, listen to the testimony presented here in Court, listen to the law as propounded by the Judge, and render a fair and impartial verdict based solely upon those two things?

A. I could, yes.

Q. You are not acquainted with Jon Yount then, I presume?

A. John who?

Q. I believe you stated you were not acquainted with Jon Yount, the defendant?

A. Yount, no.

Q. Are you acquainted with any members of the Rimer family at Luthersburg?

A. Not that I know of.

BY MR. FENNELL:

Pass the Juror.

BY MR. SABINO:

Q. Are you familiar with either Mr. Reilly, the District Attorney or Mr. Fennell, the Assistant District Attorney?

A. Never met them.

Q. Is there anything you know of at this time which would influence your judgment in this case if

you were a juror other than the evidence [211] which would come forth in this case at this time?

A. No.

Q. Mr. Clapsaddle, at one point you did indicate you had had some opinion?

A. Yes.

Q. Are you able to erase that opinion from your mind now and afford the defendant the presumption of innocence?

A. Yes I could, yes.

Q. Have you done it. Can you do it now?

A. You mean erase the opinion?

Q. Yes?

A. Yes I could, yes.

Q. Having been informed again, let me just say this once more—having been informed now that the defendant is entitled to this presumption of innocence that I mentioned to you, have you erased your opinion and are you now affording the defendant that presumption?

A. That he is innocent?

Q. Yes, until proven guilty?

A. Yes.

Q. Would you require the Commonwealth to produce the evidence to prove him guilty?

A. Yes.

Q. Or would you require that the defendant come forth with evidence to prove he is innocent?

A. Oh, yes.

[212] Q. Which would you require?

A. Well, you couldn't require either one until you got all the facts.

Q. What?

A. You couldn't prove either one, guilty or innocent until you heard all the facts in the case.

Q. No, my question is..

BY THE COURT:

I would like to make it clear. The law is, no defendant has to prove his innocence. His guilt must be proved by the Commonwealth beyond a reasonable doubt. Can you accept that?

A. Yes I can.

BY THE COURT:

I think this witness has answered these questions?

BY MR. SABINO:

Q. Mr. Clapsaddle, would you require the defendant to produce evidence as to his innocence?

A. Would I what?

Q. Would you require the defendant, Jon Yount, to produce evidence as to his innocence?

BY MR. FENNEL:

I believe we have gone into this matter and I believe he answered.

BY THE COURT:

I think so too and I believe you asked questions that come up at trial. He said that Mr. Yount does not have to prove his innocence. Did I so understand?

A. Yes.

[213] BY THE COURT:

This is getting extended far beyond what is proper.

BY MR. SABINO:

Defendant accepts the juror.

BY MR. FENNELL:

Commonwealth will accept the juror.

BY THE COURT:

The Clerk of Courts will kindly swear the juror and you will seat the juror.

Juror took place in front of Seat No. 2. in Jury Box.

BY MR. HILL:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania vs. Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. I do.

Juror seated.

BY THE COURT:

Mr. Clapsaddle, our provisions or procedure for trial is such that you are not to remain seated in the Jury Box during the voir dire of the other witnesses. Therefore, the tipstaves will conduct you to a jury room where you will remain with the other juror already chosen until you are given further directions.

Now, Mr. Clapsaddle, the Court admonishes you and orders you not to talk about this case with anyone nor allow anyone to talk about [214] it with you, nor permit within your hearing, anyone to talk about it, except among the jurors, of course. You jurors are certainly, in your privacy permitted. No one else, no one and there is no exception to that. Even the tipstaves may not discuss the case with you. However, you are in case of necessity allowed to ask the tipstaves to get anything for you personally and they will call your home for you if you will just write a list. A paper and pencil is permitted. That only goes to the tipstaves and its only for what you want brought here for your personal use while you are sequestered. You will not now return home until this case has been disposed of. So, Mr. Clapsaddle, when you're in the jury room make your list and they will obtain your clothes and what all your want. During your period of sequestration they will also obtain your other personal wants for you. Now Mr. Clapsaddle, during the period of your sequestration you will not be permitted newspapers, magazines, radio, television or anything of that nature. All telephones have been removed from the jury rooms and you can't telephone. We would ask you to be extremely careful not to declare anything when you are walking to and from the box or to and

from your dining rooms. Be sure that you don't refer to the case so that you will not be overheard to talk about this case whatsoever. Therefore, if you do not talk about this, you cannot be overheard. We ask that you use extreme common sense to realize that these rules are entirely proper in justice, not only to the defendant, but to the Commonwealth too; to the defendant, to the attorneys and to everyone who may be influenced directly or indirectly, [215] and, therefore, we ask your patience and your consideration through the whole of this period in accepting the fact that you must abide by all of these rules which we have imposed upon you by law. So with that, you will now be conducted to the jury room by the tipstaves.

. . .

[367]

JOHN YORKE called by the Clerk.

BY THE CLERK:

Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. KING:

Q. Mr. Yorke, would you tell me your address please?

A. 940 Hill St., Houtzdale.

Q. How far is that from Clearfield?

A. About seventeen miles.

Q. In which direction — South — East?

A. Going West.

Q. Going West. Are you married?

A. Yes.

Q. Do you live with your wife?

A. Yes.

Q. And have you any children?

A. No.

Q. Are you employed?

A. No.

Q. Are you retired?

A. Yes.

[368] Q. Prior to your retirement for whom did you work?

A. I worked in Brooklyn, New York.

Q. Brooklyn, New York?

A. Yes.

Q. What did you do there?

A. I was a machinist.

Q. By whom were you employed?

A. A. Shaler & Son.

Q. What kind of machinist were you?

A. Mechanic machinist.

Q. You ran a machine—metal working machine?

A. Setting them up—setting the machines up.

Q. You were a set up man?

A. Yes, we set up machines.

Q. Generally, what kind of work did they do there?

A. Parts for cars—guages—pumps or other items like that.

Q. And how long were you employed there?

A. Fifteen years.

Q. Was your home in Brooklyn—were you born in Brooklyn?

A. No. I was born in Ireland.

Q. When did you come to the United States?

A. In 1925.

Q. After doing that, where did you live?

A. Do you mean when I came to the United States?

Q. Yes?

[369] A. I lived in 464 Hawthorne Street in Brooklyn.

Q. Mr. Yorke, how long have you lived at your present address?

A. About four years.

Q. Four years?

A. Yes.

Q. And prior to that you lived in Brooklyn?

A. Yes.

Q. Did you ever live in Clearfield County before four years ago?

A. No.

Q. Is your wife from Ireland also or was she from here?

A. She's from Madera.

Q. Did you meet her after you came to Clearfield County four years ago?

A. No. I met her in New York.

Q. And was she living in New York at that time?

A. Yes.

Q. But her home was here in Madera?

A. No she had a home in New York also. 821 Union Street.

Q. Is your wife employed any place outside the home?

A. Not now.

Q. Was she before?

A. Well when she was in Brooklyn she was employed.

Q. Was there any particular reason why you and your wife came back to Clearfield County to live that you know of?

A. She was from Madera and when I retired we moved here.

Q. It's a nice place to live?

[370] A. Yes.

Q. But not as nice as Ireland?

A. Yes, it's okay, but not with the tax so much.

Q. Did you ever visit Remolin Castle outside Shannon?

A. Never tell of that.

Q. Was that the part of Ireland you were from?

A. No, I was from the Western part.

Q. Out where the grass is real green?

A. No.

Q. All chalky isn't it?

A. Yes.

Q. Mr. Yorke, do you know of the matter involving Jon Yount?

A. No.

Q. Have you read anything about Mr. Yount?

A. No.

Q. You don't know anything about the reason why you're here—or why you were called to come here as a prospective juror?

A. No I don't know.

Q. Have you read anything in the newspaper about it?

A. No.

Q. Have you heard any discussions or heard any radio broadcasts about it?

A. No.

Q. Do you recall Mr. Yorke, just when it was four years ago that you came to Clearfield County—when did you move here, do you remember?

[371] A. It was in January, about '66.

Q. In January of 1966?

A. Yes, January 1966 I am pretty sure of that.

Q. And you don't recall any newspaper articles concerning the matter involving Mr. Yount?

A. No.

Q. Or any radio broadcasts?

A. No.

Q. Or television broadcasts?

A. No I never have seen that.

Q. Mr. Yorke, what do you do since you're retired—do you have any avocation?

A. I have no business of any kind. No work at all. I do not work any place.

Q. Have you any kind of hobbies?

A. No. The only thing I do is a little gardening.

Q. Gardening?

A. Yes. That's all I do.

Q. What do you do when the snow is on the ground?

A. I have to keep the driveway clear. That's about all.

Q. And on the days when we don't have snow, what do you do?

A. I do some hunting and things like that.

Q. Do you have friends with whom you hunt?

A. I have a brother-in-law in Madera. That's the only one I have around Madera.

[372] Q. Do you meet with him and talk with him very much?

A. Yes I do. We pal together and we go hunting together.

Q. Has he lived around Madera all his life, as far as you know?

A. As far as I know.

Q. What do you talk about with this brother-in-law?

A. Well, we have conversations here and there.

Q. About various news items?

A. Well, about home and so forth and how I like to live at Madera or Houtzdale and so forth.

Q. And do you discuss political matters that are involved around here?

A. Not on the political side anyways.

Q. How about various news items in the newspapers. Do you discuss those?

A. No. Newspapers I don't see very often. There's just the Progress and I don't have that.

Q. You don't have the Progress. What newspaper do you get?

A. I get it on Sunday—from the Pittsburgh Press.

Q. Is that the only paper you get at your home?

A. Yes.

Q. Do you have a television set?

A. Yes.

Q. And a radio?

A. Yes.

Q. When you received your notice to come and perhaps serve with us [373] and help us as a juror, did you discuss this with your brother-in-law?

A. No.

Q. You didn't see him since you got that notice?

A. No.

Q. Did you discuss it with your wife?

A. I told my wife, I said the notice to be on the jury was what it was.

Q. Did she tell you what case you might be asked to hear?

A. No.

Q. Did you have any idea or did you know what case you might be asked to hear?

A. No I didn't. No.

Q. While waiting around here the last several days have you read any newspapers?

A. No.

Q. Have you heard any discussions—

A. No I don't. I didn't hear any.

Q. By anybody—concerning Mr. Yount?

A. No.

Q. About anything?

A. Not about anything of that kind.

Q. Not anything of that kind. Is that what you said?

A. Not anything along the line you're speaking about.

Q. Mr. Yorke, is there any—do you have any condition of personal health or does your wife have a condition of personal health that would make it awkward or bad or difficult for you to be away from your wife and home for a prolonged period of time—perhaps two weeks?

[374] A. No. It wouldn't interrupt in any way.

Q. It wouldn't interrupt anything?

A. No.

Q. When did you first find out that one of the cases or the case you would be asked to hear would be the Yount case?

A. I don't know what case.

Q. You—what don't you know?

A. I don't know what case.

Q. You know now, don't you?

A. No I don't.

Q. Don't you know now?

A. No.

Q. You have no idea of what case you are going to be on right now?

A. No.

Q. No idea at all?

A. No.

Q. Suppose I ask you if you know anything about Mr. Yount. Do you—does that name mean anything to you?

A. No it don't mean nothing to me.

Q. You've never heard that name before?

A. No.

Q. Never at all?

A. No.

Q. Mr. Yorke, do you want to sit on a jury involving this case—do you want to be on the jury?

[375] A. Well that's if I qualify and if I don't, I don't want to.

Q. The answer to the question—

BY THE COURT:

I think he answered.

BY MR. KING:

Q. That's how we decide, by asking you these questions. I'm trying to find out by the last question. Do you have a feeling or reason that you want to be on the jury?

A. Well I don't mind being on the jury but if I can't qualify I wouldn't want to.

Q. I don't expect anybody to get mad—but do you have a reason for feeling why you would like to be on?

A. No, not no reason to want to be on the jury I have. No reason I have.

BY MR. KING:

Pass the juror at this time.

BY MR. REILLY:

Q. Mr. Yorke, are you acquainted with any of the attorneys for the defendant—Mr. Blakley, Mr. King or Mr. Sabino?

A. No I don't know them at all.

Q. None of them?

A. I don't know anybody in this room.

Q. Mr. Yorke, you stated you do not know the defendant, Jon Yount. Did you say that?

A. I do not know him.

[376] Q. Do you know any members of his family?

A. No.

BY MR. REILLY:

Pass the juror.

BY MR. KING:

Q. Mr. Yorke, do you have any opinion as to this case that we're talking about. Do you know what case we're talking about now?

A. Yes, it's a Mr. Yon you say.

Q. Jon E. Yount?

A. Yes, Jon Yount.

Q. Do you have any reason—strike that—do you have any opinion as to his guilt or innocence?

A. No I have no opinion?

Q. You have no opinion at all?

A. No.

BY MR. KING:

The defense accepts the juror.

BY MR. REILLY:

The Commonwealth accepts the juror.

BY THE COURT:

The Clerk of Courts will seat and swear in Mr. Yorke.

BY THE CLERK OF COURTS:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania versus Jon E.

Yount, Defendant, and a true verdict give according [377] to the evidence and that as you shall answer to God at the Great Day?

A. I do.

(Juror Seated—Juror Number 4.)

BY THE COURT:

Mr. Yorke, you are now a juror in this case. This is a capital case. It is a case where felonious homicide has been charged. The court wishes to advise and admonish you that you are not to discuss this case with anyone or allow anyone to discuss the case to you or refer to it in your presence without reporting such a matter to the Court. If any of this kind of thing happens you will kindly report it to the Court. You are to refrain from any discussion of the case with other jurors when on recess outside—but when in the jury room you are privileged to discuss this case. Now, members of the jury are not permitted however to discuss the case with anyone else nor allow anyone else to discuss it with them and that includes the tipstaves. However, if you have personal wants of any kind you will notify the tipstaves and they will take care of them. Now, they are not to deliver letters. You are not permitted to write to any one or call anyone. Of course, you won't have any telephone in your rooms because they are disconnected but we ask that you make no attempts to contact anyone at all. While you are in the course of this trial, if there be anything you need you will tell the tipstaves and I will determine whether it is proper to be obtained for you or not. Now, we know you need clothing and things so when you are taken into the jury room, there will be paper

and pen—make a list of the things [378] you desire and the tipstuffs will contact whomever you tell them to contact to obtain these things. That person or persons will also be told they are not to deliver any communications to you of any kind. You will not be allowed any newspapers, television, telephone or radio. But we will try to make it as comfortable for you as possible while you are there. There will be cards to play and that's about the sum and substance of it because we are not allowed to provide any reading material for you whatsoever. We ask you to be very patient and considerate of the situation and we know you will be. Remember, you will always take Seat Number 4 when reporting into the Jury Box in the Court Room where you are now seated. They are all numbered. The tipstaff will now conduct you to the jury room.

BY THE COURT:

You may proceed to call another juror.

* * *

[405]

* * *

MARY JANE WAPLE called by the Clerk.

BY THE CLERK:

Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing

but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. KING:

Q. Is it Mrs. Waple?

A. Yes sir.

Q. Where do you live?

A. Bigler, Pennsylvania.

Q. Where is Bigler, Pennsylvania?

A. It's approximately nine miles from here—between Clearfield and Philipsburg.

Q. And how long have you lived there?

A. Thirty years.

Q. Thirty years?

A. Yes sir.

[406] Q. Are you married?

A. Yes sir.

Q. And how long has your husband lived there?

A. Twenty-nine years.

Q. Twenty-nine years?

A. Yes sir.

Q. You've just recently been married?

A. No sir.

Q. How long have you been married?

A. Eleven and a half years, approximately.

Q. Do I understand you have lived there 30 years and your husband 29 years. Is that what you said?

A. Yes sir.

Q. Something strikes me as being inconsistent?

A. Well, we are both from there—we were both born and lived there but he is about a year younger than I am.

Q. Have you any children?

A. Yes sir.

Q. How many?

A. Two.

Q. What ages?

A. My daughter is 11 and my son is 4-1/2.

Q. Just you, your husband, and two children live at this address?

A. Yes. It's a double house and another lady lives in the other side of the house.

[407] Q. Is she related to you?

A. No sir.

Q. Are you employed outside the home?

A. Yes sir.

Q. What do you do?

A. I have the Mens Department at Ames Department Store.

Q. And what do you do there?

A. I take care of the Mens Department and run cash register.

Q. You are a sales person?

A. Yes sir.

Q. How long have you been doing that?

A. Just since September.

Q. Is your husband employed?

A. Yes sir.

Q. By whom?

A. Tafco. It's a Division of Titan Metal Corporation.

Q. Where is that place of employment?

A. Hyde City.

Q. Hyde City?

A. Yes.

Q. Where is that located?

A. Just on the other side of Clearfield, towards Curwensville.

Q. What is the nature of his work?

A. He's a—he puts the doors and insulation on coolers.

Q. It's a manufacturing plant?

[408] A. Yes.

Q. He works in the plant?

A. Yes sir.

Q. Putting things together?

A. Yes.

Q. How long has he been doing that?

A. Four years.

Q. As I understand you have been married about eleven and a half years you said?

A. Yes sir.

Q. And lived at the same place all that time?

A. No. When we were first married I lived with my parents while he was overseas and then we moved twice but we never moved out of Bigler.

Q. Is there any reason, personal reason, that you might have of health or home obligations that would make it difficult or impossible for you to be away from your work and home for a prolonged period of time?

A. No sir.

Q. Do you read the newspapers?

A. Not now.

Q. Not now?

A. No.

Q. Prior to being instructed by the Judge not to read any newspapers did you read newspapers?

A. Naturally.

[409] Q. And do you know the matter with which we are concerned—about Jon Yount—do you know of the matter?

A. Yes, but I don't know any details. I don't know anything about it.

Q. Just what you've read?

A. I didn't read it in the paper—just that it was coming up but I didn't know I would be involved.

Q. Do you recall reading in the newspapers about it a number of years ago?

A. Yes.

Q. When I talk about reading newspapers, I don't just mean yesterday or the day before, or today, but at any time?

A. Yes, but I'm not very good with dates—I don't remember.

Q. I'm not asking what you remember but the fact that you did read something about it?

A. Of course.

Q. And do you recall discussing it or hearing it discussed by other people over the years—back three or four years ago?

A. No—not until just recently.

Q. Not until just recently?

A. Yes.

Q. When you received your notice to come here as a prospective juror was the matter then discussed to a certain extent?

A. No—I didn't—I simply don't know. I have been working and didn't know what's been going on.

Q. None of the customers coming into the store about the time you [410] got your notice mentioned anything about it to you, or did you ever mention it to them?

A. It's a big store. Rarely anybody comes in that I know real well.

Q. Did you mention it to your husband?

A. Of course.

Q. And you and he discussed it to a certain extent?

A. He told me just this week maybe that's what it would be.

Q. Did he express to you any opinion he might have had on the matter?

A. He just didn't know what he'd do without me, that's all.

Q. That's very understandable. Did he express any opinion concerning Mr. Yount? That you can recall? Without telling me what it is?

A. No. It simply wasn't discussed. I just thought — I just didn't think I would be here, that's all.

Q. Even after you got your notice you didn't think you'd be here?

A. I didn't know until this week that the case was coming up.

Q. When you found out it was coming up, you remembered things you had heard about it in the past. Is that what you mean?

A. Yes.

Q. And can you recall having any kind of opinion about the case or about Mr. Yount concerning his guilt or innocence—did you have a feeling about it?

A. Well, I had remembered that they said he was guilty before and I didn't understand why they were having another trial.

[411] Q. Having remembered that, did you have an opinion as to whether he was or was not guilty without telling me what your opinion was?

A. Just a lot of wondering about it. I don't know him or anything about him.

Q. Did you tell me you did read the newspapers prior to coming to Court in which the newspapers contained matters about the matter?

A. No I didn't.

Q. Did someone read the newspapers to you?

A. No sir. I told you someone had told me it had been in the paper.

Q. And the person who told you—was it your husband?

A. No. It was my mother.

Q. Your mother?

A. Yes.

Q. Did your mother express any opinion to you that she might have about the matter?

A. No.

Q. Do you talk to your mother very often?

A. Quite often.

Q. Is your mother familiar with the matter concerning Mr. Yount?

A. I don't know—I had to ask her—I told her I may be having jury duty and would she stay with my children at this time—it was just—Tuesday, and I asked her if she would stay with my children. Prior to that I thought my children would be staying with my husband.

Q. Your husband works every day, does he not?

A. Yes.

[412] Q. Your husband would not be able to stay at home with the children, would he?

A. No. My father comes in while I'm at work.

Q. Do you Mrs. Waple, presently at this time, have an opinion about Mr. Yount's guilt or innocence?

A. No.

Q. You don't have any opinion at all?

A. I don't know anything about the man or about this case, only what I have read years ago and I hardly remember that.

Q. Well you do remember something based upon what you read and heard several years ago—is that true?

A. Yes.

Q. Does that cause you to have an opinion at this time about him—without telling what your opinion is?

BY MR. REILLY:

Your Honor, she's already answered.

BY THE COURT:

You may answer again.

A. I don't have an opinion.

BY MR. KING:

Q. You don't have any opinion?

A. No. I just don't know.

Q. You don't know what?

A. I don't know if he's innocent or guilty.

Q. I'm not asking you that.

A. I don't have an opinion. I'm not judging him.

[413] Q. Would you be able to put out of your mind anything you have thought or read or anything you have heard about him before entering the jury box — would you be able to erase it from your mind?

BY THE COURT:

I don't believe the law requires you to do that — as long as she doesn't have an opinion.

A. I think I could I could certainly try. I think in a matter like this, all you can do is to ask for God's guidance.

Q. Would you look to God for some information or guidance as to how you should render a decision in this case if you were selected as a juror?

A. What I meant was I hope that I would be attentive and have the common sense to search my heart and mind and make an honest decision.

Q. Would you look to the Lord for Guidance in making that decision?

A. Yes.

Q. You would?

A. Yes.

Q. Would you look to the Lord for guidance along these lines in deference to instructions from the Court as to how you should view or look at the evidence and facts as developed in the evidence?

A. I don't understand the words "in deference".

Q. I'll change it to preference. Would you look to the Lord for guidance rather than the instructions from the Court?

A. No.

Q. Mrs. Waple, has this matter we're talking about been the subject [414] of any discussions at your work that you've heard?

A. Not that I recall.

Q. Do you know—has your husband told you whether or not it has been a matter of discussion at his work?

A. No. We were more concerned with what to do with the children and how the house would be taken care of in case I wasn't there.

Q. Then you anticipated you might be a juror in this case. Isn't that correct?

A. Not in this case. All I know is sometimes that lock people up on a jury and neither one of us know very much about the law.

Q. You considered the possibility then, that you might be selected as a juror and you would be locked up, so to speak, and not be home for a while?

A. Yes.

Q. Did you want to be on this jury?

A. Not really.

Q. Do you know of any—the fact that you don't want to be on the jury, would this affect your ability to follow instructions from the Court and to decide whatever you would be asked to decide?

A. No. I would just rather not.

Q. You'd rather not be on the jury?

A. Right.

Q. Is this because of your reasons that exist at your home or just your general feeling?

A. Just a general feeling.

[415] BY MR. KING:

Pass the juror.

BY MR. REILLY:

Q. I think you were probably asked this, but do you know or are you acquainted with the defendant, Jon Yount?

A. No.

Q. Or any members of his family?

A. No.

Q. Do you know any of the attorneys representing Mr. Yount here—David Blakley, Mr. Homer King, or Mr. Frank Sabino?

A. No.

Q. And, therefore, I assume you never used their services in any legal matter?

A. I have never been involved in any legal matter.

BY MR. REILLY:

Pass the juror.

BY MR. KING:

Q. I assume Mrs. Waple, you do not know Mr. Reilly or Mr. Fennell?

A. No I don't.

Q. Are you acquainted with any members of the local or State Police?

A. No.

Q. No members of your family are parts of those organizations?

A. No sir.

Q. Are you acquainted with the family by the name of Rimer around Luthersburg?

A. No sir.

[416] Q. Did you ever hear of them?

A. Isn't that the other party involved?

Q. Yes?

A. Only through the newspapers.

Q. Only what you've read?

A. Yes.

BY MR. KING:

Defense accepts the juror.

BY MR. REILLY:

Commonwealth accepts the juror.

BY THE COURT:

Mr. Hill, you will kindly swear and seat the juror.

BY MR. HILL:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between The Commonwealth of Pennsylvania versus Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. Yes.

BY MR. HILL:

Please be seated.

BY THE COURT:

Mrs. Waple, you have now been seated, of course, and sworn as a juror in the case of Commonwealth versus Jon E. Yount which is a homicide case and we would ask that you not discuss this case with anyone nor allow anyone to discuss it with you. [417] Also, that you not attempt to make any contacts with anyone because you will be sequestered with other jurors now and you are not permitted any contacts with anyone else. However, your personal wants will be taken care of. For instance, and I know you will want certain clothes and other personal needs. If you

will make out a list in the jury room the Tipstaves will see to it that those are brought to you. Please do not, again, make any contacts with anyone. Also again, do not allow anyone to talk to you or you are not to talk to anyone else or to say anything about this case within the hearing of others. If these things come to your attention, as I said before, you are to report them to the Court. While sequestered in the deliberation room you are permitted among yourselves to discuss this case, but not allowed to talk to anyone else. Now we ask that you keep these rules so that we won't have any problem and I am sure you will. So the tipstaves will now take you to the jury room and you will then make out your list. Alright. Mrs. Waple conducted to Jury Room by Matron.

BY MR. SABINO:

Mrs. Waple is crying Your Honor.

* * *

[437]

* * *

JAMES F. HRIN called by the Clerk.

BY THE CLERK:

Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the [438] answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. FENNELL:

Q. Where do you live?

A. My address is 127 Hill Street, DuBois, Pennsylvania.

Q. How long have you lived there?

A. A full resident — all my life, 39 years.

Q. Are you married?

A. Yes.

Q. Do you have any children?

A. Yes.

Q. What are their ages and sex?

Q. Three boys — two girls.

Q. Do you remember their ages?

A. The boys — 3 — 3, 6, 9, 11 and 12.

Q. What is your occupation?

A. Chemist.

Q. By whom are you employed?

A. Rockwell Manufacturing.

Q. In DuBois?

A. In DuBois.

Q. How long have you been so employed?

A. With Rockwell?

Q. Yes?

[439] A. Thirteen years.

Q. Are you acquainted with Jon E. Yount, the defendant in this case?

A. Do you mean do I know him?

Q. Do you know him personally?

A. No I do not.

Q. Do you know any members of the Jon Yount family?

A. I have met Mrs. Yount.

Q. His wife or his mother?

A. His mother.

Q. Have you ever met his wife?

A. I have not.

Q. How well do you know his mother, Mrs. Yount?

A. I'm involved as Precinct Chairman and Mrs. Yount is Precinct Chairman at Sebula I think. I have met her possibly in the last two years—I have met her at the different meetings.

Q. Have you ever had occasion to discuss Jon E. Yount with his mother?

A. No I have not.

Q. Have you ever had any discussions with her at all except relating to politics?

A. No. None whatsoever.

Q. Have you ever met Pamela Sue Rimer?

A. No.

Q. Did you ever meet any members of the Pamela Sue Rimer family?

A. No.

[440] Q. Have you formed any opinion as to the guilt or innocence of Mr. Yount?

A. To the degree that it was written up in the papers, yes.

Q. Is this a fixed opinion on your part?

A. This is sort of difficult to answer. Fixed?

Q. Let me ask—if you were to be selected as a juror in this case and take the jury box, could you erase or remove the opinion you now hold and render a verdict based solely on the evidence and law produced at this trial?

A. It is very possible. I wouldn't say for sure.

Q. Do you think you could?

A. I think I possibly could.

Q. Then the opinion you hold is not necessarily a fixed and immobile opinion?

A. I would say not, because I work at a job where I have to change my mind constantly.

Q. Would you be able to change your mind regarding your opinion before becoming a juror in this case. That's the way I must have you answer the question.

Q. If the facts were so presented I definitely could change my mind.

Q. Would you say you could enter the jury box presuming him to be innocent?

A. It would be rather difficult for me to answer.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law [441] presented by the Judge?

A. That I could do.

BY MR. KING:

Q. Mr. Hrin, is there any reason of health of yourself or wife or family or any business reason that you have that would be detrimentally effected—or your family—that would cause you concern if you were away from your home or family for a prolonged period of time?

A. I have 5 kids. That should answer.

Q. You think that would be detrimental?

A. They might have a good time without their Dad.

Q. I don't agree. Maybe they would like to have you around. The question is Mr. Hrin, would it work a hardship on you or on your wife if you were not at home for a drawn out period of time—perhaps several weeks?

A. I don't know what she would have to say. I don't imagine she would like it, if that's what you mean.

Q. I was trying to find out if it would work a great hardship and I imagine you would have some concern which you do—would this concern be such as to effect your judgment or effect your decision, or—

decision you might be called upon to make during the course of trial?

A. No—I would say—if you approached it with that in mind—definitely not.

Q. Did I understand Mr. Hrin you would require some—you would [442] require evidence or something before you could change your opinion you now have?

A. Definitely. If the facts show a difference from what I had originally— had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind—is that your position?

A. Well—I have nothing else to go on.

Q. I understand. Then the answer is yes—you would not change your mind until you were presented facts?

A. Right, but I would enter it with an open mind.

Q. In other words, you're saying that while facts were presented you would keep an open mind and after that you would feel free to change your mind?

A. Definitely.

Q. But you would not change your mind until the facts were presented?

A. Right.

Q. And the opinion you have you would keep until the facts were presented—is that correct?

A. Since there's nothing else in my mind except what I originally read, right. The fact that there has been a new trial re-scheduled may cause some doubt as to the original facts.

Q. But it hasn't changed your opinion?

A. Well the opinion isn't as solid as it originally was.

Q. But it still is solid—not as solid—but solid?

A. Right.

[443] Q. Spoken like a true engineer.

A. Not an engineer—I'm a chemist.

BY MR. KING:

We would challenge for cause.

BY MR. FENNELL:

We would answer the challenge before the Court's ruling. He has already declared he could decide the verdict solely upon the evidence and law presented and he definitely said he could.

BY MR. SABINO:

Your Honor, I think we went through this matter yesterday.

BY THE COURT:

I don't think his answer is that he could not enter the jury box with an open mind. He said he could go in with an open mind and therefore I deny the challenge for cause. I deny the challenge for cause because he declared he could go in there with an open mind; and Commonwealth against

Bentley sets forth that—any juror is incompetent who has a fixed and definite opinion which cannot be erased by hearing the evidence—and he said he could disregard it and be guided by the law and evidence, and I believe he stated he could go in with an open mind. I would accept that as being sufficient to overcome the conviction that you proposed that he has a fixed opinion that he could not put aside and I think his answers were unequivocal enough as to any fixation as to opinion as he declared although he had a solid opinion it is not quite as solid as it used to be which indicates that it is not solid. [444] His expression is such that there is not now a fixed opinion and therefore I so accept it. Alright.

BY MR. KING:

If it please the Court I believe I was interrogating the juror.

BY THE COURT:

Go ahead.

BY MR. KING:

Q. To clarify something Mr. Hrin, I thought I understood, but in the light of the Court's observations, I'm not sure that I now understood what you said. I understand what the Court just said but I am not sure I understand what you said before. Did you not say that you had an opinion but that it was not quite as solid as it was before?

A. Yes.

Q. But you would still require evidence to be presented before you could in fact change your opinion—is that what you said?

A. The fact that the trial has been reopened indicates that there may be something left unopened. I said my opinion is not as solid and possibly I could enter the box with an open mind. I think I do this every day. You try out processes that you're sure are going to work and you definitely change your mind. I don't know if that's the answer you want.

Q. Regardless whether it's the answer we want, we are just trying to get an answer too so we can judge you and decide upon you.

A. It's rather difficult to live in DuBois and get the paper and find out what the people are talking about—at least the local [445] people without having some opinion or at least reserving some opinion.

Q. That's very true. And you do have and have had an opinion?

A. I had an opinion, right.

Q. The question now is then Mr. Hrin, is whether or not you can set that opinion aside before hearing any of the facts or evidence—set it aside before you enter the jury box; not after, but before. Can you do that?

A. The opinion isn't as solid—to completely wipe—or forget what I had heard previously about the case—

Q. You still remember that?

A. I remember reports about it or talking about it—to be honest with you I didn't really read all the articles in the paper because I know they were possibly played up a little. I didn't particularly like the man that wrote the article so I didn't take too much time. Everybody is entitled to their own views on personalities, but when I started to read it, it sounded like a fiction story and I don't care to read fiction.

Q. Mr. Hrin, I have to come back to the question that—can you put aside whatever opinion you had—solid, unsolid or however you want to describe it—can you set it aside before you go into the jury box or would you need some evidence before you could change your mind? Now think about it for a second.

A. I have to.

Q. Give me yes or no?

A. I think I could enter it with a very open mind. I think I could [446] very easily. To say this is a requirement for some of the things you have to do every day.

Q. Then let me ask you one more question Mr. Hrin—we have asked you a number of questions and we try to find things here, but do you know of any reason that I may not have touched upon why you should not be a juror in this case?

A. Outside of the fact that you'd be locked up for three weeks which wouldn't be a very pleasant experience.

Q. Does the thought of that effect you in such a way that you feel you could not be a juror?

A. I told you earlier, this wouldn't enter into my decision or my making the decision.

Q. Do you know Mr. Reilly or Mr. Fennell on my left over there?

A. I have seen Mr. Fennell in DuBois being a local resident. I don't know him personally. I didn't know that was Mr. Reilly.

Q. Do you belong to the same clubs or groups, or organizations that Mr. Fennell belongs to?

A. I said I don't know him—I guess I don't.

Q. You said you saw him?

A. I seen him on the streets. I may have grown up at the same time, but I think we went to different high schools.

Q. You have never had any discussion with him or he has never served as counsel for you?

A. Definitely not.

Q. Do you know Mr. Blakley?

A. Not personally.

[447] Q. Have you any friends or acquaintances among the local or State Police?

A. Would you repeat that?

Q. Do you know any State Policemen?

A. Oh sure.

Q. Can you tell me who you know?

A. Ken Bundy.

Q. Do you know Mr. Ellenberger?

A. Yes.

Q. How do you happen to know him?

A. The Elks sponsors Youth Day—in the community the students take over government. The Mayor, the Councilmen—all the City offices, including the Patrolmen and we have gone out in the past 12 or 13 years to include the State Police. The students go along with the State Police to find out what their duties are for the day and this is mostly the way I got to meet some of the State Policemen.

Q. Over what period of time has this association with the Police existed?

A. They have been replacing them for about—the project has been continuing—a continuing project for about 13—14 years—about 14 years—they keep changing them. That's how I got to meet them.

Q. Do you see these Policemen on fairly frequent occasions?

A. Definitely not.

Q. About how often?

[448] A. Once a year when you go out to make arrangements and when the day is—that's it.

Q. When is the last time you saw or spoke with Mr. Ellenberger?

A. Quite a while—he hasn't been around for a while.

Q. A couple years?

A. I would say so.

Q. Since 1966?

A. I think he was there in '66—I'm not real sure.

Q. He was there in '66?

A. I think he was—I'm not real sure.

Q. Do you recall talking with him back around '66?

A. To pinpoint it to a date, I can't.

Q. Just generally—do you have a recollection of being with him or discussing things with him?

A. Yes. I said it would be over what would happen on that day and that's the only thing.

Q. Any other policemen you know—except Mr. Bundy and Mr. Ellenberger?

A. By name I couldn't—well, let's see, Sgt. Shaginaw—I think he's passed away—by name I don't know.

Q. Do you know Mr. Bundy very well?

A. To see him—to speak to him.

Q. Where did you speak with him yesterday?

A. Probably at the bottom of the steps—to talk about whether it was snowing outside or not—yes, that was yesterday.

Q. Can you tell us when the time before that was that you saw him?

[449] A. Probably the day before that.

Q. The same place?

A. Yes, or the Elks when they went through for lunch.

Q. Did Mr. Bundy ever discuss with you the Yount matter or did you ever discuss it with him or hear him discuss it with anyone else?

A. No.

Q. Would the fact that Mr. Bundy might be a witness for the prosecution in this matter effect your judgment or effect your decision in any way?

A. Not any more than you. He has a job to do like anybody else.

BY MR. KING:

Pass the juror.

BY MR. FENNELL:

Q. Mr. Hrin, one further question. You have stated earlier you were acquainted with Mrs. Yount, the mother of Jon Yount?

A. Yes.

Q. Would your association with her effect in any way the verdict which you might render if sitting as a juror in this case?

A. No. I don't know her too well. I met her at these political meetings. I think she's a very nice person and that's the extent of it.

BY MR. FENNELL:

Commonwealth will accept this juror.

BY MR. KING:

Defendant will accept the juror.

BY THE COURT:

Very well, Mr. Hrin, will you please be seated and the Clerk [450] will swear you as Juror Number 6.

BY THE CLERK:

You do swear by Almighty God that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania versus Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. Yes.

BY THE COURT:

May I have all of counsel at the bench?

(All counsel approach bench)

BY THE COURT:

Mr. Hrin, you have now been seated and sworn as Juror Number 6 in the trial of this cause. I would ask that you not discuss this case with anyone nor allow anyone to discuss it with you or within your hearing while on any recesses or at any time. Also, if these things come up, please bring them to the attention of the Court.

Jurors are permitted to talk about the case within the jury room but you see, you will be on recesses coming back and forth to the jury room, and to the bus and be taken to the quarters and things like that, so please refrain from any reference to the case so that there won't be any possibility of there being any error made in this keeping or not keeping the rule which I

have now given you. These matters will be given to you by reminders again.

Now, we ask too that you not attempt to contact anyone nor allow anyone to contact you during this period because that is also [451] forbidden. However, you are permitted, when you get to the jury room, to make up a list of those things you want, and the Tipstaves will see that they are brought to you while you are serving with us. You will be completely sequestered during the course of this trial. So we would ask, therefore, that you abide by these rules. We ask your patience and consideration and we are sure you will comply.

BY MR. HRIN:

Is it possible to get my automobile home?

BY THE COURT:

A. Yes and you will make those arrangements with the Tipstaves. Remember, Tipstaves can't discuss the case, but things of that nature can be conveyed to them and they will convey the messages to the Court. But the case itself cannot be discussed or even referred to in talking to them. They are not better off or have no more authority than any ordinary person, and their job is to see to your personal matters. But you cannot talk on a telephone, listen to a radio or television. Those are all cut out in your rooms and you are not allowed to use any of them. You dare not communicate with anyone except the Tipstaves and the Judge if it becomes necessary.

(Juror conducted to Jury Room by Tipstaff)

BY THE COURT:

We will now recess for ten minutes.

3:58 p.m. Court recessed.

4:08 p.m. court reconvened. Defendant present in Court.

* * *

[559]

MARTIN R. KARETSKI called by Clerk.

BY THE CLERK:

Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. KING:

Q. Where do you live?

A. DuBois.

Q. Whereabouts?

A. 102-1/2 South Jared Street.

Q. Are you married?

A. Yes sir.

Q. And live with your wife?

A. Yes sir.

[560] Q. Children?

A. Four.

Q. Their ages?

8. A. I have a girl 14; girl 13; boy 11; and, a girl

Q. And are you employed sir?

A. Yes sir.

Q. By whom?

A. B & O Railroad.

Q. What do you do for them?

A. Welder. My official title is Carman but I weld for the railroad.

Q. Where do you do that?

A. The car shop in DuBois.

Q. How long have you worked for them?

A. Since 1950.

Q. Prior to that for whom did you work?

A. Well, I graduated in 1949 from high school
—I just loafed around that year.

Q. Mr. Karetski, is your wife employed outside the home?

A. No sir.

Q. Mr. Karetski, you read the newspapers?

A. I would say every day.

Q. And you listen to the radio and watch television?

A. Before I go to work I listen to the radio and at night I watch TV.

Q. Are you aware of the matter concerning Mr. Yount?

A. Yes I know what it's about.

Q. Not personal knowledge, but you have read about it?

[561] A. Just what I have read.

Q. You have heard the matter discussed over the years?

A. In the past few years I haven't heard too much about it.

Q. In 1966 when the matter came up before you knew about it then?

A. Yes sir.

Q. And just recently when this matter was coming up again, I presume?

A. What I have read in the paper again.

Q. And you have heard other people discuss it?

A. Not too many so far.

Q. You have heard other people express opinions about it?

A. Not too many of those so far too.

Q. Back around '66, did you?

A. Yes in '66.

Q. From what you read and what you have heard have you ever expressed an opinion about Mr. Yount?

A. Maybe if I was in a bar drinking; I never gave it any serious thought.

Q. There's no reason to any more than anybody else but you have heard opinions. I assume you had an opinion as to his guilt or innocence?

A. I had an opinion yes.

Q. Do you have an opinion today as to his guilt or innocence?

A. It's been a long time ago and I'm not too sure now. It was in the paper he plead not guilty.

Q. What you just read the other day—

A. I think about Tuesday or Wednesday's paper.

Q. So based upon what you read about it a long time ago as well as [562] what you read about it within the last few days, do you have an opinion as to his guilt or innocence?

A. Honestly, I couldn't say now.

Q. Are you saying you don't have an opinion or don't know if you have an opinion?

A. I probably don't know if I have an opinion.

Q. Let me ask you this then. In case you do have an opinion, could you wipe it out of your mind—erase it out of your mind before you would take a seat in the jury box and hear whatever evidence you might hear?

A. As it is right now I have no opinion now—four or five years ago I probably did but right now I don't.

Q. You think you had an opinion then?

A. Probably, like if I was in a bar room drinking, I might have said something then.

Q. And after what you read within the last few days, did this cause you to remember things you had read or heard, say back in 1966?

A. It caused me to think about them but I couldn't recall them exactly.

Q. I'm not asking you Mr. Karetski, to remember what you thought about then, but your general opinion. Don't tell me what it was—but the fact that you had an opinion then?

A. I probably had an opinion then, yes.

Q. Now, has anything happened to change your opinion from what it was then, to what you have today?

A. Not that I could really say, no.

[563] Q. Then I suppose you would say today you do have an opinion as of now as to his guilt or innocence?

A. As of now I don't have—as of now I don't but then I did have an opinion.

Q. What happened Mr. Karetski, between then and now to eliminate that opinion if you can tell me?

A. Well, as far as I'm concerned there wasn't much in the paper about it and it sort of slipped away from thought.

Q. When you think about what you learned about it then, can you now say you have absolutely no opinion at all?

A. I have my doubts whether I have an opinion right now or not.

Q. We have to know, Mr. Karetski, whether you do or you don't. We only know by asking you?

A. That makes me think a little bit then. How about a possibility of an opinion? I mean I'm not too sure.

Q. No, I'm sorry. You have to make up your mind whether you do or not.

BY THE COURT:

If that's his final answer—he doesn't have to change it.

BY MR. KING:

We are just asking him what it is.

Q. We cannot help you to make up your mind. You have to tell us?

A. Yes.

Q. That's all I'm saying to you.

A. Honestly right now I can't say if I have an opinion or not [564] because it's been so long ago since the last case. I probably had an opinion then but I don't now. That's all I can say.

Q. Mr. Karetski, is there anything in your relationship with your job that would make it difficult or impossible for you to be away from your employment

for a prolonged period of time—several weeks say—if you were to be a juror here?

A. No sir. I don't think so.

Q. Do you have any situation at home that would work a hardship on your wife and children?

A. The only thing—it might work a hardship there. I was talking to the Chief Clerk at the shop yesterday. I was selling poppies last night and I—he happened to stop in the store where I was and I asked him if he turned a time card in for every day I work—so he says—you're not making any time or pay till this is completely over. When you bring that slip back you will then receive your money. So the only thing there is I have a pay coming yet two weeks from yesterday and then there won't be anything coming in.

Q. Would this work a hardship on you or your wife or family?

A. I don't know about me but it probably would work a hardship on my wife with no money coming in.

Q. Would this hardship be such that you would worry about it?

A. I don't know. She does a fairly good job of taking care of the house—running things.

Q. Would you be concerned about it?

A. At times I might be.

[565] Q. Would this affect your ability to follow the evidence and testimony that might be presented to you—do you think it would affect your judgment in some respects?

A. I sort of doubt that because a long time ago I used to see different fellows with gray hair and ulcers that's younger—I said that comes from worry. I said, don't worry. Things will work out eventually. I said look at me, ten or fifteen years older than you and no gray hair, no ulcers. I just sort of let things slide by.

Q. Besides working as a car repairman, what else do you do?

A. To get wages?

Q. No—do you have another job?

A. I have a job in our local Union. I'm Treasurer of our Local Union. And in the VFW in DuBois I'm Post Commander.

Q. We had another gentleman I believe, a steward. Do you know him. I'm sorry, that was from the Legion. As Commander of the Post do you come into contact with a number of people?

A. At the Post meetings we usually have just small turnouts but at the District meetings I come in contact with people and banquets, conventions and things like that.

Q. How long have you been Commander?

A. I went into office this past July.

Q. Prior to being Commander, did you hold other offices with the organization?

A. Yes.

Q. What?

A. Chaplain and Guard both. Chaplain one year. Guard the following year.

[566] Q. How long have you been a member of the Post itself?

A. I think I got active again in '66 or '67.

Q. Was one of the places you heard the Yount matter discussed in the past the Legion?

A. I don't belong to the Legion.

Q. VFW, I'm sorry.

A. In the VFW, no sir.

Q. At the place where you're the Post Commander.

A. That's the VFW.

Q. In addition to that office that you hold, do you belong to any other clubs?

A. Polish Citizens Club, Polish Am-Vets Club and the Lithuanian Club.

Q. Do you hold any offices in those?

A. None in those three.

Q. Just a social member?

A. Just a member, no offices.

Q. You just visit there for the purpose of socializing?

A. Yes sir.

Q. And in addition to those associations have you any other—what else do you do?

A. I don't believe there's anything else. Try to bring good cheer I guess.

Q. Do you hunt or fish?

A. No, I gave up hunting the year after I got out of Service.

Q. In what branch of the Service were you?

A. Army.

[567] Q. In what years?

A. 1950 to 1952.

Q. Were you in Korea?

A. No sir. I served in Germany during the Korean conflict.

Q. Do you have any desire to be on this jury?

A. I just started giving it thought recently. I thought it wouldn't be a bad idea for experience. I have never been on a jury before. I'd like to know what it's like to be a juror. I have learned what it's like to be coming here the last three days.

Q. Do you mean because of the unpadded seats out there?

A. Yes sir—those are padded but I don't know if they are much more comfortable.

Q. I take it then sir, that you would like to be a juror?

A. The way I've been thinking lately, yes, I'd like to be a juror.

Q. And your reason for wanting to do this is just as a matter of experience. Is that just the idea?

A. Yes, I guess that's what it comes down to, yes, because I have never been a juror. Some people have been on smaller cases but we've never talked about it.

Q. Have you ever flown an airplane?

A. Myself?

Q. Yes?

A. No sir, but I have flown in them.

Q. Now that you've had a little bit of experience of what may be involved in the waiting you've done and in light of what I've said to you that you might be here for a while and the thoughts that you have [568] had regarding hardships to your family due to your being away from your work and your family, do you still think the experience of serving as a juror—do you still think you would like to have that experience notwithstanding these other considerations?

A. I still think—this is the first time I've ever been called. I had no idea what went on. I still would like to be a juror someday, somehow. I would like to be on some kind of a jury.

Q. Maybe you can. When you go to learn to swim you don't go out to the ocean and jump off?

A. Not me. I swim like a rock.

Q. Do you know sir, of anything in your experience and background that would be any reason why perhaps you should not be a juror on this case?

A. You mean pertaining to Mr. Yount or pertaining to me?

Q. To Mr. Yount or anything pertaining to you. I have touched on a number of subjects here trying to give you food for thought so you could weigh and consider all these things to find out how you feel. Maybe I've missed something?

A. When I was younger I always thought that somebody that ever got in trouble couldn't be called for jury duty. I was in one or two scrapes while I was a juvenile and when I was overseas while in the Service. I sort of borrowed another fellows pass and went out that night. That didn't set too well.

Q. Well, that's a thing any normal, red blooded American might do. I don't see anything wrong with that.

A. They restricted the one-half of the outfit and my buddy didn't [569] want to go so I said I'll sneak out on his pass.

Q. What's in a name, right?

A. I got caught.

Q. The fact that his name was on that paper didn't bother you particularly, did it?

A. What really hurt was he was Corporal and the MP asked me where my stripe was and I didn't have any and he took me back to Camp.

Q. Do you have any friends or acquaintances among the police force, either local or State Police?

A. I know most of the—I'd say probably four or five policemen in DuBois. I know them fairly well but we don't associate. They're on one side and I'm the other. They have their job to do and I stay out of their way. I know the Chief and some of the older police there but you don't pal around with them or rove around with them. It seems they're a different class altogether.

Q. A different breed of cats?

A. That's even better yes.

Q. And how about with any members of the State Police force. Have you any association with them at all?

A. I know a few to see them. At times when I went out to the farmers to get milk I would stop at Twin Oaks—there might be one in there and I would talk but that's all.

Q. You've never attended any of the clubs, the social clubs with them?

A. With them, no, but I was at the Lions Club here in October and I think the Master of Ceremonies was a State Policeman, Corporal Ellenberger or Sergeant Ellenberger.

[570] BY THE COURT:

It's Lieutenant.

A. I didn't know. The last I knew it was Sergeant. I don't know him personally but I did meet him that night at the banquet.

Q. About how long ago was that?

A. This past October, 5th or 6th—something like that.

Q. Just last month?

A. Last month, yes sir.

Q. At that time had you received a notice for Jury?

A. No sir.

Q. He did not discuss anything about the Yount matter?

A. The only thing he said—he introduced himself and I did too—and he said, you'll probably be sitting at the head table. It turned out I didn't sit at the head table, and those were about the only words we had. I thought I was supposed to sit there but I wasn't.

Q. Since you occupy at the Post a position of relative leadership, do you think that you would be aware of the feelings that some of your Post members and other officers might have, when they might eventually be called upon to vote for you in a subsequent election. Do you think you might be tempted to think about how they might think of you because of the way you might decide in this matter?

A. I don't know how to decide. As I say, I have no opinion but after this year, I'm done I hope—I'm through holding an office. I'll assist other officers.

Q. Would you be subject to any kind of criticism or say disaffection?

[571] A. I don't think so. It would probably be like now. Some fellows like me—some fellows don't. It would probably continue the same way.

Q. Do you read any stories about Court proceedings and Court trials?

A. Not about Court trials. I do read detective magazines. I read *Inside Detective* and *Front Page Detective*.

Q. Do you remember reading any stories of Mr. Yount's matter in one of those magazines?

A. If it was in one—it wasn't in neither one and I buy them almost every month. I could have missed it but—

Q. Back around '66 or '67?

A. Like I said, those are the only two detective magazines I buy and there was no story about him in either one of those.

Q. Did you once think of being a detective or policeman?

A. No. I like detective stories. I don't know why. Some are happy stories; some are sad stories but—

Q. Do you watch television stories about—

A. Cowboys.

Q. Do you watch Perry Mason?

A. I used to watch Perry Mason. I was going to have him as my attorney if I had any trouble with my wife because he never loses a case. She says we won't have any trouble.

Q. Who was she going to get?

A. She had first call on him.

Q. In the detective magazines that you read do you find a preponderance of cases where the detective is always triumphant like Perry Mason?

A. In the two ones I read, every once in a while they are followed [572] up. I don't know if the cases are re-opened or not, but the reporter doesn't believe the person is innocent and he follows it through and it proves the detective was wrong.

Q. So you don't exactly have a detective syndrome as to the fact that detectives are always right?

A. I guess that's what it would lead up to.

Q. Do you know Mr. Reilly, the District Attorney?

A. I have seen him these past three days coming to or back from the Diner over here but I don't know him personally.

Q. And there was a Mr. Blakley who is not here now. Are you acquainted with him? He's a lawyer?

A. Maybe through the family—through my Mother. I think my Mother—I couldn't say I know Mr. Blakley either.

BY MR. KING:

Pass the juror.

BY MR. REILLY:

Q. Mr. Karetski, do you know or are you acquainted with the defendant Yount?

A. I seen the defendant once or twice. That was maybe '63, '64, '65 playing softball.

Q. Did you ever meet him?

A. No sir, not that I know of.

Q. Did you ever play softball with him or against him?

A. What I did, I usually—I kept score for the Pulaski Ball Team.

Q. Did he play for the Pulaski softball team?

A. No sir. He played, I believe, for Shaffer Siding.

[573] Q. Did you ever talk with him or anything like that?

A. No.

Q. Do you know or are you acquainted with any members of his family?

A. No sir.

Q. This Mr. Blakley they spoke of is David Blakley from DuBois. You don't know him?

A. Not that I can recall.

Q. Then I assume he's never represented you?

A. No.

Q. Do you know Mr. King or Mr. Sabino other than as having seen them this week?

A. The first time I found out who Mr. King was I believe yesterday and somebody said King—he was coming up the stairs—somebody said it was the man with the hair.

BY MR. REILLY:

Pass the juror.

BY MR. KING:

Q. Do you know the name Rimer?

A. Before I heard—before it was in the paper. The only Rimer I knew was down by Grampian—down by Clarion. Our team had a playoff game down there—that was in Rimersburg.

BY MR. KING:

Q. That's in Clarion County?

A. Yes.

Q. Then you saw the name Rimer in the paper in connection with Mr. Yount, is that right?

[574] A. Well, that's the only time. I don't know of the Rimer family.

Q. Are you acquainted with police officers other than the ones we talked about here?

A. Probably in the VFW travels I probably came across some and also during hunting season. They stay at the Home Camp—State Troopers from Ohio and maybe a few town Constables.

Q. You're not particularly friendly with them, is that true?

A. I didn't say I'm not friendly with them. Nick Petrovich—is Chief of Police in Masontown and he was—he stayed upstairs in the Club. He was a little friendly fellow. Once in a while we'd B S about things.

Q. Different cases he was on?

A. Never even gave that a thought. He was up there to have fun. We just talked about babes, booze —how he done on that day—hunting—

Q. Just swapped lies?

A. Yes. Since I don't hunt anymore I can't tell too big of ones.

Q. Mr. Karetski, we talked a little while ago at some length as to whether you were real sure you had an opinion and you were thinking about it. As you think about it, do you believe that you could put this opinion that you are not sure whether you have or not, completely out of your mind, and judge the facts

that you're called upon to decide, based solely on what would be produced here in Court?

A. I have had no opinion – and I mean, I don't think that would be bothering me, if I was here for it.

Q. In addition to what you would learn here, if we would accept you, would you also be remembering these other things that you have heard [575] and learned about in the past or would you be able to set it out of your mind?

A. That might come back to memory but I couldn't say. That might come back and that might not. That probably wouldn't have any bearing. I couldn't say for sure though.

BY MR. KING:

Defense accepts the juror.

BY MR. REILLY:

Commonwealth will accept the juror.

BY THE COURT:

You will step down and be seated in Seat Number 7; and the Clerk of Courts will kindly swear the juror.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania vs Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. I do.

BY THE COURT:

You have now been sworn and seated as Juror Number 7. You will always take that seat during the trial of this case and the Court wishes to direct and order you that during any recesses or any other time you are not to discuss this case with anyone nor allow anyone to discuss it with you or within your hearing without reporting such a matter to this Court if it should come to your attention. Of course, you can discuss it with other jurors but only in your Jury Room.

[576] I would ask that you be sure to remember this at all times because in addition to that, you are not allowed the use of a telephone or television or radio nor any reading material. There will be some amusement matters such as games and cards that are being made available in your rooms but other than that you are not to engage in any of it. I ask and order that you not contact anyone. You may talk to the tipstaves but not about the case. You are about to be taken into the Jury Room and you will make a list of things you want brought here for your personal use while you are a juror, such as clothes and other things of that nature. If you drove your car the tipstaves—they will make arrangements to take that car back for you. Mr. Gordon has driven other cars back in the DuBois area. We will provide somebody to take your car back and also to direct your family to prepare a case for you in order that you may have proper clothes. Also, during the trial if there are personal needs you will tell the tipstaves. They will tell the Court and that will be taken care of if possible. You are not to write any letters or notes to give to them to

turn over to anyone. You are allowed no communication of any kind. We hope you will be patient with it and hope that you will not allow it to become a boredom for you. We appreciate the fact that there is this sequestration. You are put all by yourselves but we think this—you can take care of that in your own way. You will now be conducted to the Jury Room. Make up your list so they can see to get your things for you. Give them the keys to your car and they will see it is taken home.

* * *

[784]

* * *

JULIA C. HUMMEL called by the Clerk.

BY THE CLERK: Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the [785] answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. KING:

Q. Mrs. Hummel?

A. Yes.

Q. Where do you live?

A. 122 Fulton Street, Clearfield.

Q. How long have you lived there?

A. Since 1949.

Q. And do you live with your husband?

A. Yes.

Q. Do you have any children?

A. Two boys.

Q. What are their ages?

A. Twenty-six and twenty-four.

Q. Do they live with you?

A. No.

Q. Where do they live?

A. One in Duncansville, RD and one is at Mc-Connellsburg.

Q. Are they married?

A. Yes.

Q. How are they employed?

A. They are both Ministers.

Q. What does your husband do?

[786] A. He works for Kurtz Brothers.

Q. What does he do for Kurtz Brothers?

A. Deisel Mechanic.

Q. How long has he been so employed?

A. Twenty some years. I don't know – either 23 or 24 years.

Q. Where are they located?

A. Down here at the corner of Reed Street.

Q. Just a couple of blocks from here?

A. Yes. It's school supplies.

Q. Does he work right in the shop or plant?

A. In the garage.

Q. Are you employed Mrs. Hummel?

A. I'm on disability pension from Bell Telephone.

Q. How long have you been on pension?

A. It would be three years this November.

Q. You mentioned it's disability pension. Do you have some condition of health—

A. I had a spinal fusion done on my back and they just don't feel with the amount of absences I could go back to work.

Q. When did you have the laminectomy?

A. Sixty-seven—three years this November 12 I know. It was in Pittsburgh.

Q. How long did you work for the Telephone Company?

A. I worked there prior to when I was married—I worked there—then my husband was inducted to the Service and I went to California and I came back here and had my children—one boy before my husband [787] went overseas and when he came back I had my other boy—17 years and 3 months I have accumulated service but I worked longer because I worked part-time occasionally.

Q. The Telephone Office in which you worked, is that right here in Clearfield?

A. Yes.

Q. From what you've told me you were so employed during 1966?

A. Yes.

Q. And '67 up until your operation?

A. Yes.

Q. Were you just a general operator or did you do anything particular?

A. I was a senior operator and part-time supervisor and part-time clerk.

Q. Mrs. Hummel, are you familiar with the matter concerning Jon Yount?

A. Not too much.

Q. When I say familiar, I don't mean do you have any personal knowledge. You do know there's such a case?

A. Yes.

Q. And you're familiar with the fact there was another case about four years ago?

A. Yes, but I wasn't too familiar with that. I wasn't feeling too good myself and I didn't know too much.

Q. You knew there was such a matter?

A. Oh yes, yes I did.

Q. You knew it existed?

A. Yes, that's right.

[788] Q. You read the newspapers?

A. Not too much.

Q. You heard the radio and television –

A. I can't say that I did too much.

Q. Did you at all?

A. I'd say yes, a little.

Q. You knew what the matter concerning Jon Yount was about, did you not?

A. Yes.

Q. You knew it wasn't about the telephone strike?

A. Oh yes, definitely.

Q. Now, in hearing about this matter did you hear other people express opinions concerning Mr. Yount?

A. Yes.

Q. Did you upon occasion perhaps express an opinion you had about it?

A. Not necessarily because I couldn't say. I just –

Q. Regardless of whether you were required to or not, did you ever? That's what I'm asking you.

A. I myself, at the time it happened – I can't recall but I may have said, perhaps so or something like that. As I stated, my health wasn't good then and that's why I wasn't – at that time I was under quite heavy sedation and my health wasn't good and I

wasn't out around too much except to work and back because I had so much pain.

Q. You were working at that time, were you not?

A. In '66, yes.

Q. And you were doing the other things that you'd ordinarily do?

[789] A. Wait—'67—November '67 I had the operation. Then in March of '66 I had a disc removed. That was down in Pittsburgh too. I went back to work, I believe, in June.

Q. Of '66?

A. Of '66.

Q. And then you worked up until November of '67?

A. September 22nd.

Q. And you had the laminectomy?

A. I went down there and they sent me back because I had a cold and I went back down again.

Q. To Pittsburgh?

A. Yes.

Q. Do you belong to any clubs Mrs. Hummel, any ladies clubs?

A. No.

Q. While you're on disability pension do you do anything except take care of your home and chores around there?

A. I have a lady come in and do it but I have taken on some work this summer. I'm trying selling. I'm selling Dutch Maid clothes and my husband goes to put it up and I do the demonstrations.

Q. Do you go to people's homes to do this?

A. Yes.

Q. And put on the demonstration and show how to do these different things?

A. Yes.

Q. How long have you been doing that?

A. June 9th I started.

[790] Q. When?

A. June 9th – June.

Q. Since June 9th?

A. Yes.

Q. And about how many demonstrations do you put on a week?

A. Well in June I think I only had three but lately I have averaged two to three a week.

Q. Have you ever been called or served on a jury before?

A. No, I was called once but not on any case.

Q. About how long ago?

A. It must have been '65.

Q. In this particular Court?

A. Yes. I'm not sure of the year but before I had the operation—before I had the first operation, the disc operation.

Q. Mrs. Hummel, if you were to be asked to stay with us and serve as a juror on this case, would it work any great hardship on you because of your health or because of any other reason if you were asked to stay here and perhaps be with us for perhaps several weeks?

A. I don't know who is going to take care of my stock and merchandise. I—somebody could get in touch with my supervisor and she could take over. I'm a nervous person. I'm a nervous person.

Q. You're nervous?

A. Yes.

Q. Are you under any kind of medication for your nervousness?

A. Yes.

Q. Do you take medication for it?

[791] A. Yes.

Q. And do you have that medication now?

A. Yes.

Q. How often do you take it?

A. Just as I need it. I take valium and I take $\frac{1}{2}$ tablet in the morning and maybe one at noon and maybe $\frac{1}{2}$ at night and always $\frac{1}{2}$ when I go to bed.

Q. Do certain types of activities increase your metabolism so that you are required to take this

valium and other medication more frequently—if you know?

A. If I get highly upset I'd say I would have to take—I'm not allowed to take more than four a day.

Q. That's the valium you're talking about?

A. Yes.

Q. How is your back condition since you have had the spinal fusion?

A. I was down at Philadelphia Medical Center in Philadelphia in September and he said he thought my back was fine but because of the absence of the disc—and I had a hysterectomy a number of years ago—and my fusion, it was—there was so many days—The Telephone Company is very very strict on their attendance and Dr. Erle said that he would have to wait and weigh this very highly and he said once they put a girl out on disability pension, they think a long time before they do this. He said I would have to go each year to get a check up. If he means I'll go to work, I don't know.

Q. Having had the spinal fusion is your back effected by periods of long sitting?

[792] A. No, sitting doesn't bother me but I do have to lay on a very very hard bed.

Q. Do you have a special bed at home?

A. An orthopedic bed.

Q. And if you don't sleep in your special bed, does it cause discomfort?

A. Yes.

Q. And if you undergo this prolonged discomfort does this effect your health generally?

A. No, it's just I get in a place generally if I travel or anything, what I'll do is, for me, is put the mattress on the floor and we'll have the bed made up on the floor for me because that's the only thing solid enough for me and that way I can rest.

Q. You told me before Mrs. Hummel, that you did have an opinion concerning Mr. Yount. Is that correct?

A. I said I had mentioned it at the first, yes.

Q. And now do you have an opinion today as to Mr. Yount's guilt or innocence?

A. Well, only on just what he said himself—that he was guilty.

Q. Then you do have an opinion regardless of what it was based on—do you have an opinion right now?

A. I really don't know what to say. I don't know what would be the truth, whether to say yes or no.

Q. You mean you can't tell which would be the truth and which would not be the truth?

[793] A. I can't say that he was guilty or that he wasn't.

Q. I'm not asking you that. I'm asking whether or not you have an opinion as to which it is, without telling me which opinion you have. Do you have an opinion as of right now?

A. No.

Q. What happened to cause you to lose or dismiss or set aside the opinion you did say you had?

BY MR. REILLY:

Well Your Honor—

BY THE COURT:

She said she was under sedation—she couldn't remember. She didn't say she had one. Is that correct Mrs. Hummel?

A. Yes, that's correct.

BY MR. KING:

Q. Mrs. Hummel, I'm not asking you right now what your opinion is, but merely whether or not you do have an opinion, without asking you what it is. Do you recognize the difference?

A. There's so much at stake. I couldn't say because I don't know that much about it and that's the truth. I really don't.

Q. As I recall a couple of minutes ago I asked if you had an opinion as to Mr. Yount's guilt or innocence and you said yes, only because he had stated that he was guilty?

A. Yes, that's what I said.

Q. In consideration of what you know he said, you have an opinion. Is that correct?

A. I wouldn't know without hearing the whole story because how do [794] I know what he did.

Q. What you said he said caused you to have an opinion. Is that correct?

A. I suppose you would say that would be correct.

Q. What?

A. I suppose you would say that is correct. I – just because he said it, I believed it.

Q. Did that cause you to form an opinion?

A. Well really I didn't think any more about it because I was –

Q. Please answer my question.

BY THE COURT:

I think this lady has answered but if you want some other answer you may ask the question.

BY MR. KING:

The answers, I would submit to the Court, have been highly equivocal and I only want to find out a firm answer of the jurist so we could go from there.

BY THE COURT:

Yes, but you shouldn't say to her she hasn't answered when she has. This woman has been answering your questions.

BY MR. KING:

I didn't mean it to sound that way. I meant the answer she had given was not an answer to the question.

BY MR. KING:

Q. Mrs. Hummel, you told me a few minutes ago you did have an opinion [795] which was, of course, based on what you understood Mr. Yount to have said?

A. Right.

Q. Is that right?

A. Right.

Q. Okay now. So, therefore, you do have an opinion. Is that correct?

A. That was at that time.

Q. Alright now, what occurred, or what—has anything occurred—anything happened that you know about that caused you to change the opinion that you just told me you had?

A. No, because I had completely forgotten about it. I was so sick myself I didn't think of anything.

Q. So nothing has happened to cause you to change that opinion then. Is that true?

A. That's right, only just by what he had said at the time. Now, I don't know anything as far as what's going on or prior to when he had said he was guilty. I hadn't read any paper. I couldn't I was flat on my back and I was—in fact, I wasn't much in Clearfield, over town, only about five times over the past three years.

Q. Mrs. Hummel, if you were to be asked to be a juror in this case would you be able to put aside this opinion that you have and then decide the case only

on evidence that you would hear in Court and instructions that you would get from the Court? Think for a minute to see if you understand what I said – what my question was.

A. I couldn't say yes or no until I had heard.

[796] Q. Well, would you still remember the things you were talking about before and would you consider those things as well as the things that you would hear in the Court Room – would you put them all together before you would try to decide is what I'm asking?

A. No, I don't think so.

Q. What would you consider?

A. What evidence I heard because that's the only thing I could base my own personal opinion on. It would be what I would hear because I don't know only just what he said. Even, I don't know exactly where it happened because I wasn't conscious of the fact at that time to know because I was working under a very heavy strain.

Q. Nobody is asking you anything about that Mrs. Hummel. Mrs. Hummel, are you familiar with or acquainted with any members of the State Police or any police department?

A. Yes, I know Trooper Harris.

Q. Where is he located?

A. He was in Punxshtawney. I think he's back in Clearfield now, I think.

Q. How do you happen to know him?

A. Through Church.

Q. To what Church do you belong?

A. Calvary and Independent Bible Church.

Q. Is there anything in your religious training or religious following that would prohibit you from sitting on the jury and judging?

A. No.

Q. How do you happen to know Lt. Harris?

[797] A. He's been to our Church and his wife has a beauty parlor and I've had her do my hair a couple of times but mostly from visiting in the Church.

Q. Has he visited in your home?

A. No.

Q. Have you visited in her's?

A. No.

Q. Are Lt. Harris and your husband friends?

A. They know each other. I'd say Dan knows more State Police than I do because he goes to the State Inspection meetings and they are there at those meetings.

Q. Has your husband ever expressed his opinion concerning Mr. Yount?

A. No.

Q. I'm not sure if I asked you, do you know Mr. Reilly or Mr. Fennell?

A. I know Mr. Reilly but I don't think he knows me.

Q. How do you happen to know Mr. Reilly?

A. He was here when I was on Traverse Jury before.

Q. When was that?

A. I think about five years ago; it was before my operation.

Q. Did you sit on any case in which Mr. Reilly represented one side or the other?

A. I can't recall. I only sat in on one and probably Judge Cherry could help me out on that. The case was—the man from Curwensville that had molested a little Plymptonville girl in Elementary School. What was his name?

[798] BY THE COURT:

My memory isn't that good.

BY MR. REILLY:

I remember that case—Riddle.

A. I sat on that case, but I don't remember who the attorneys were.

BY MR. KING:

Q. You know Reilly was one of them?

A. I know he was here. That's how I know him.

Q. Mrs. Hummel would you like to sit on this jury?

A. I wouldn't like to.

Q. Do you know of any reason that we have not touched upon why you should not?

A. No.

Q. Do you know of anything in your own business, emotional or health that—social or family life—

A. There's just my husband and I at home. There would be my business and that would have to be taken care of by some one—or taken over by my supervisor. If I was called—that's the only thing I'm thinking about. That's why I said I would rather not. That's why I said I would rather not, because of my business I'm in.

Q. Would the fact that you're concerned about your business militate to cause you to not be able to pay attention and not follow what was going on—would you be concerned about it?

A. Not if I knew she was taking over for me, then I'd be alright.

Q. How would you know it?

A. She would have to be let known. She doesn't even know I'm here. [799] She lives in DuBois.

Q. Do you have a supply of your prescription—of your valium?

A. Yes.

Q. Do you have a supply of that?

A. Yes.

BY MR. KING:

Pass the juror.

BY MR. REILLY:

Q. Mrs. Hummel, do you know or are you acquainted with the defendant Yount?

A. No.

Q. Or any members of his family?

A. No.

Q. Do you know Mr. David Blakley from DuBois?

Q. Or Mr. King or Mr. Sabino?

A. -No.

BY MR. REILLY:

Pass the juror.

BY THE COURT:

Q. Do you know any of the Rimer family – R-i-m-e-r?

A. No.

BY MR. KING:

Defense accepts the juror.

BY MR. REILLY:

Commonwealth accepts the juror.

[800] BY THE COURT:

Mrs. Hummel, will you step down and be seated in Seat Number 8 where you will be sworn.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between

the Commonwealth of Pennsylvania vs Jon E. Yount, defendant, and a true verdict give according to the evidence and as you shall answer to God at the Great Day.

A. I do.

BY THE COURT:

Mrs. Hummel, you have now been sworn and seated, of course, as a juror in this case. The Court would admonish you at all times you are not to discuss this case with anyone nor allow anyone to discuss it with you, nor allow anyone to discuss it within your hearing except other members of the jury of course. If any of these other things occur, please call them to the attention of the Court.

You will be sequestered in the Holiday Inn where you will be quartered and also will receive your meals, except the noonday meal which you will receive here. We ask that at all times you be extremely careful and that you refrain from talking about anything concerning this case in a loud voice at all, because you might be heard, when being brought back and forth to be fed or to be quartered. You may talk to the tipstaves and matrons only to receive personal needs or things of that nature. Not even they are permitted to talk about the case with you. They are there to serve you and, [801] therefore, the only purpose they serve is to—as a matter of security and to take care of your wants. When we file you into the Jury Room to await further Court, we would ask that you make up a list of things you will want obtained from your home for you and of course, if in the process you will need other things as each day goes on, you may

tell them what you want. Write it out and then we will pass upon it. You are not allowed to send any notes of any kind except that they be passed upon by the Court. We desire that there be no communication. Therefore, there is no telephone to be used at any time. The television and radio are not to be used. In fact, they aren't there but we would ask that you not make any attempt to use any of those. There are some provisions for occupying your time such as games and things like that but if there should be anything at all to satisfy your purposes you may inquire about it and we will pass upon it. However, I do ask that as soon as you get into the room, write your needs down so that we may contact your home. You may also direct who is to be called, as I recall your testimony—who is to be called to take over your work such as a supervisor. I believe you mentioned it was your supervisor. Therefore, we will take care of informing those persons. Alright. You will now be conducted to the Jury room.

BY JUROR:

Q. Can I have my medication brought?

BY THE COURT:

Yes, at all times, definitely. We have already renewed one prescription for one of the jurors. We will take care of. Just notify [802] the tipstaves.

We will call a five minute recess.

3:50 P.M. Court recessed.

4:05 P.M. Court reconvened. Defendant in Court.

OMAR H. IVES called by the Clerk.

BY THE CLERK: Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. REILLY:

Q. Will you state your name?

A. Omar H. Ives.

Q. Where do you live?

A. Tyler, Pennsylvania.

Q. How long have you lived there?

A. Twenty-six years.

Q. Mr. Ives, are you married?

A. Yes I am.

Q. Have you any children?

A. Two.

Q. Their ages?

A. Twenty-two, twenty-four.

Q. Are either of them living at home with you?

A. They are not.

[803] Q. Mr. Ives, by whom are you employed?

A. Arco-Speer Carbon, St. Mary's.

Q. Arco-Speer Carbon. Mr. Ives, do you know or are you acquainted with the defendant, Jon Yount?

A. I do not know him personally.

Q. Or any members of his family?

A. I know his father.

Q. How well do you know Mr. Yount?

A. Pretty well. I worked with him.

Q. You worked with him?

A. In the same plant.

Q. Did you ride back and forth together?

A. No sir.

Q. Mr. Ives, do you feel your acquaintanceship with the defendant's father would influence your decision if you were selected as a juror in this case?

A. No sir.

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. I would like to be able to truthfully answer that. I'm not sure.

Q. Well Mr. Ives, if you were selected to sit as a juror in this case would you be able to enter the jury box with an open mind and base your verdict only on the evidence and testimony that you would hear plus the instructions that the Judge would give you?

A. I believe I could sir.

Q. You could do that?

[804] A. Yes.

Q. And would those two items, the evidence and testimony and the Judge's instructions be the only things that you would base your verdict on?

A. I believe so sir.

Q. Do you know Mr. David Blakley of DuBois?

A. Not personally.

Q. Has he ever done any legal work for you?

A. I believe at one time I had a Deed searched and I believe his name was on it.

Q. Would your knowledge or acquaintanceship with Mr. Blakley in any way influence a verdict which you may be asked to render?

A. I wouldn't know Mr. Blakley if he was in front of me.

Q. Well he's not.

A. I wouldn't know him.

Q. Do you know Mr. King or Mr. Sabino?

A. No sir.

Q. And you have stated, I believe, your acquaintance with Mr. Yount would not in any way influence or effect your verdict in this case. Is that correct?

A. Yes sir, that is correct.

Q. That is correct?

A. That is correct.

BY MR. REILLY:

Pass the juror.

[805] BY MR. KING:

Q. Mr. Ives, how long have you worked at this plant you work at?

A. Twenty-nine years.

Q. What is your specific employment — what do you do?

A. A kiln attendant.

Q. Kiln attendant?

A. In other words, yes, I have control of firing — the baking in the kilns at Arco Speer.

Q. You turn the gas on and get the temperature constant or do whatever you do to keep it constant?

A. That is correct.

Q. And as I understand you've worked with Mr. Yount, Senior?

A. Not personally with Mr. Yount. I worked in the same plant as Mr. Yount and know him. I was never employed with him as he is a brick layer and his job at Arco Speer was a bricklayer at the time he worked there. I was around him quite a bit. I control the kilns and he took care of the brick work.

Q. These are lined with brick?

A. The kiln, it is brick.

Q. And have you ever spoken to the elder Mr. Yount in the course of working in the plant?

A. Have I ever spoken to him?

Q. Yes?

A. Oh, certainly.

Q. Do you know any members of the Rimer family?

A. No sir I do not.

[806] Q. Have you ever been called or served on a jury before?

A. I have been called for jury duty. I never served on a jury.

Q. Here in this Court?

A. That is correct.

Q. When was the last time you were called, do you recall?

A. One year ago. It seems like yesterday. It seems like every time they have Court.

BY THE COURT:

Q. I'd like to be sure now. Did you say you never served on jury?

A. No, I have been called but never selected as a juror.

Q. Therefore, you never served in criminal cases?

A. Correct.

BY MR. KING:

Q. Mr. Ives, do you know any members of the State Police force.

Q. Personally? As a friend or something? No. I know a few State Policemen. Now, I know Sergeant Dussia, excuse me, Colonel Dussia. Now — and I know a couple of Ridgeway Policemen.

Q. Colonel Dussia, where is he located?

A. I believe in Harrisburg, I believe. If I'm correct — he worked at the Sub-Station in DuBois. He and I attended the same church.

Q. How do you know him?

A. From attending church.

Q. Was there somebody else you knew?

A. A few in the Ridgeway Barracks because they are from the valley where I live.

[807] Q. Do you know Spike Victor?

A. No I don't.

Q. Mr. Ives, did you tell us that you did not have any firm opinion as to Mr. Yount's guilt or innocence in this matter?

A. That is correct.

Q. And I assume you mean at this time you don't have any. Did you ever have an opinion?

A. Yes, I would say I did.

Q. Was that based upon what you have read and heard?

A. In newspapers, yes.

Q. And what — what occurred to cause you to change or to cause that opinion to go away?

A. Well I don't know. I suppose as time mellows things.

Q. Would you be able Mr. Ives, to listen to the evidence that would be produced here in Court and the instructions from the Court and then base your verdict or decision on those things alone without respect to this opinion that you used to have?

A. I believe I could sir. One reason I had—I was so upset—my daughter graduated with Pam Rimer, or would have.

Q. Did you know Pamela Rimer yourself?

A. No sir.

Q. But you say your daughter was in the same class?

A. That is correct sir.

Q. Did you ever discuss this matter with your daughter?

A. Yes, I'm afraid so.

Q. And were these discussions you had with your daughter part of the [808] things or one of the things that you had in your mind in forming the opinion that you formed?

A. I think possibly, yes.

Q. Your daughter—I gather she is married now?

A. Yes, that is correct.

Q. And where does she live now?

A. St. Mary's, Pennsylvania.

Q. What does she do over there?

A. She's a housewife.

Q. And your son-in-law, what does he do?

A. He's in bottle gas business—propane.

Q. Have you seen or talked with your daughter lately—meaning within the last couple months?

A. About this case?

Q. That was going to be my next question.

A. I saw her within the last 24 hours.

Q. And of course, if you—when did you get the notice to be here this morning?

A. Approximately 8:30 last night.

Q. Have you seen or talked to your daughter between then and now?

A. No sir.

Q. Mr. Ives, I think you told us that because of your daughter's association or relationship with the Rimer girl you were, I believe, in your words "were very upset"?

A. That is correct.

Q. Now, has there been anything that occurred between then and now [809] that you can point your finger to or can tell us that caused you to be less upset than you were then?

A. Just time.

Q. Just the passage of time?

A. Yes.

Q. Do you know of any additional facts that have been brought to your attention that caused you to have this opinion be less severe or strong than it was before?

A. No sir.

Q. If you were asked to serve with us Mr. Ives, for a period of time which might be necessary as a juror here, would it work any hardship on you in your work or in your family situation?

A. Wor^d yes.

Q. What difficulty would it cause at work?

A. Money-wise.

Q. Between the time you received your notice to come here this morning sir, did you discuss the matter over with your wife?

A. I would say yes. We talked about it.

Q. And did she express any opinion to you that she might have as to Mr. Yount's guilt or innocence?

A. I must answer truthfully?

Q. You're under oath and we expect truthful answers?

A. My wife, she's really prejudiced against him.

Q. She expressed a very strong opinion about it?

A. Yes, that's right.

Q. Did this cause you to recall the opinion that you had had previously?

[810] A. I don't think so sir.

Q. Knowing the opinion your wife has —

A. It's her mind sir.

Q. Knowing the opinion your wife has does this affect your opinion at all?

A. I don't think so sir.

Q. Did you see the papers over the last week Mr. Ives, with notice of the fact this matter was coming up again?

A. Yes sir.

Q. When you saw these notices was there any discussion at your house between you and your wife about this matter?

A. Not any great deal of discussion.

Q. You had no idea or wild dream you would be receiving a notice to be here?

A. That is correct.

Q. And in some of the conversation, I think you told me you spoke to your daughter within the last 24 hours. Was any mention of this matter made?

A. I believe she has mentioned it around home yes. After all, she knowed Mr. Yount.

Q. Mr. Yount?

A. Yes, she went to school.

Q. Mr. Ives, do you belong to any social groups or organizations?

A. I belong to the Firemen.

Q. Volunteer Firemen?

A. That is right—and a fraternal group—CFC, Catholic Fraternal Club.

[811] Q. Any others—any Veterans organizations?

A. VFW.

Q. Sportsmen's or Hunting or Service Clubs?

A. I belong to the Sportsmen's Clubs—local ones.

BY MR. KING:

Pass the juror.

BY MR. REILLY:

Commonwealth accepts the juror.

BY MR. KING:

Defense challenges peremptorily.

MRS. JESSIE M. PARKS called by the Clerk.

BY THE CLERK: Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. KING:

Q. Mrs. Parks?

A. Yes sir.

Q. Where do you live please?

A. 711 Daisy Street, Clearfield. East End.

Q. How long have you lived there?

A. Twenty-six years.

Q. Are you married?

A. Yes sir.

[812] Q. And you live with your husband?

A. Yes.

Q. Do you have any children?

A. I have two sons and two daughters.

Q. What are their ages?

A. Thirty-eight, thirty-six, thirty-three, and thirty.

Q. And where do they live?

A. Well, my youngest daughter lives in Wheaton, Maryland. My oldest daughter lives in Olanta and my youngest son lives in East End and the oldest boy lives at home with his father and I.

Q. Is the oldest boy employed?

A. He's at Batcho Typewriter Company.

Q. Is Mr. Parks employed?

A. He's in the Maintenance on the Highway Department.

Q. The Commonwealth of Pennsylvania?

A. Yes.

Q. In what area does he work?

A. At the Hyde barn up here and helps maintain and clean up on this new route along the road.

Q. How long has he had that job?

A. Four years the past May.

Q. Before he had that job what did he do?

A. At Number 2 for Harbison-Walker here in Clearfield.

Q. How long was he with Harbison and Walker?

A. Twenty-one years.

Q. Did he retire from there?

[813] A. He—yes, he took it on age and then he got a job on the Highway and he's taking his retirement in the Spring.

Q. Are you employed any place outside the home?

A. No sir.

Q. I gather Mrs. Parks you've lived in Clearfield most of your life?

A. Well, we moved from Bigler 26 years ago but I lived in Woodland until after I was married.

Q. Mrs. Parks are you familiar with the matter concerning—involving Jon Yount?

A. Yes, as much as I have read in the paper.

Q. And do you belong to any ladies clubs or social organizations?

A. No sir.

Q. Besides taking care of the home Mrs. Parks, do you do anything else?

A. My son and my husband and I fish—fly fish—something we enjoy very much.

Q. Where do you do that?

A. Well, a good many of the streams in Pennsylvania. We go over to what was formerly Fisherman's Paradise. That's where I learned to fly fish and to other open streams—just for the fun of getting out.

Q. Mrs. Parks, you have read about the Yount matter and have you also heard radio and television broadcasts about it?

A. Yes but I didn't listen too much to it. I just felt—now this is the way I felt. It was a sad case and like I say, if you believe everything you hear and you read it can make you wonder, and the least I thought about it the better I felt for all concerned. You know what I mean—because considering the gentleman that was in it [814] and the girl and her parents—and I felt—what if that would happen to me—what if that would have been my son or daughter. So the least I thought about it the better I felt about it.

Q. During the process of thinking about it and before you went through the process of thinking less and less about it, did you form any opinion as to the guilt or innocence of Mr. Yount?

A. Well, truthfully I can say this. I felt this way about it. You know they say there's two sides to every story. Like they say, our Courts are here until the

man is proved guilty or innocent and I felt this way—and in a lot of ways it didn't jibe with me and in a lot of ways it did. I can't say he's guilty or I can't say he isn't guilty and that's what my opinion is. I'm not saying yes or no. But I felt that I wouldn't want to be on the jury but then I felt—if it was my duty and I would be called I would do the best of my ability but here is Judge Cherry this morning—his summation of it. I can't exactly say in his words—either you have to prove whether he is guilty or whether he isn't. If you can remember what you said when you talked—I'm sorry—what I mean—you can say well he is, but when you get to thinking can you truly say until you actually know. When the trial was on I didn't read any of it and I didn't get up the assumption to say he's guilty and I can't say he isn't guilty. It's just the same thing and—but so—that's the way I feel about it. Now, as far as my opinion which you want, well, I would definitely have to hear it before I could say one way or other. If I'm selected that's okay and if you don't think I'm qualified that's okay too.

[815] Q. Mrs. Parks, did what Judge Cherry said this morning in part, cause you to feel the way you do right now as you have just stated to us?

BY MR. REILLY:

I think we will object to that—

BY THE COURT:

I would overrule—he is entitled to the answer. He is entitled to know.

A. Well I—like I felt—well, he's guilty and yet over the days—when it was brought up again—when

he was gonna have a new trial, I thought why should we have another trial, but yet I got to thinking. Well, I was on jury duty three years ago and picked—that in itself was education. There's too many people today that don't even know—I didn't even know myself then, how it was to be drawn or picked for jury duty and it was an education to know how this is taken care of and this is still an experience to me. And in one sense of the word—let us say I thought he was guilty—but then who am I to pass judgment—and we can say one thing but mean something else or we can mean something else and say something else. So I could say I am biased but yet there is all prospects to look at it. Now I hope—I know I'm not that well—to get this across to you gentlemen but I am just trying to explain to you. There's two sides to every story and I really don't know both sides. I hope I'm not fouling you fellows up. I know you have a job to do and it makes it hard for you.

BY THE COURT:

Mrs. Parks, I wonder if you would just step down for just a moment. This is no recess. Everybody will remain. (Judge leaves Bench).

[816] Judge Cherry returns to Bench.

BY THE COURT:

Now Mrs. Parks, you may resume the stand.

You may proceed.

BY MR. KING:

Q. Mrs. Parks, do you watch the television shows concerning trials like Perry Mason for instance?

A. Yes.

Q. And do you watch any of the other ones that may be on now since Perry doesn't appear so frequently as he used to—do you watch the other television shows?

A. Yes.

Q. Have you—you used some legal talk a little bit ago in your discussion. Is that where you learned that?

A. Well, I think to a certain degree because like I say—those I know how they're put on. But there's a lot of them that's educational, if you understand what I mean because like I said, you have no idea what the other jury—on the trial that I sat on is so much different than this but—

Q. How do you know. You haven't been in on this one yet?

A. That's true but it will be different—what I mean—

Q. How do you know that?

A. Well it would have to be different.

Q. Why?

A. It's a different case all together.

[817] Q. Would that necessarily make the trial different in your opinion?

A. No, not that I mean that as far as that goes but for the reason of this trial is so much different then to the—the other case was settling a claim for a home or something like that—and I watch the Bold

Ones and I do like that. It's, I don't know. It's just something about it that it gives you an idea of what could go on.

BY THE COURT:

I believe that would answer the question. I believe we're getting far afield as to what she watches and doesn't watch.

No offense to you—I'm just ruling on the matter.

BY MR. KING:

Q. Mrs. Parks is there any condition of health that you have or the health of your husband that might work a great hardship on you or on him if you were to be away from your home for several weeks or a protracted period of time if selected as a juror?

A. Well, I have a pancreas condition. Now, I'm under Dr. Aughinbaugh's care which I haven't seen him since April and sometimes it will flare up and lasts two or three days and other days it gets pretty severe. Whether it might cause it to flare up, I don't know. It's what they call pancreatitis.

Q. Are you on any special kind of diet?

A. Yes, I'm on a diet. I have high protein, low fat diet. This is my diet.

Q. This usually has something to do with people with pancreatitis?

A. Yes, it's the enzymes that control—breaks the food down, is what it is.

[818] Q. If you don't stay on your diet, does this cause you discomfort?

A. Well, there's different times—they have changed the diet as to what it used to be but I have to watch and it's a condition I have to live with, but I'm careful to protect myself. If I would be called it might flare up and it might not. That's something I can't tell.

Q. When you prepare your own food at home, do you keep your diet in mind?

A. Yes.

Q. If you were to be eating in a restaurant you wouldn't be able to do that—

BY THE COURT:

I beg to differ with you. We provide the proper food for all of the jurors.

BY MR. KING:

Q. I don't recall if we asked you Mrs. Parks, do you know any members of the Jon Yount family?

A. No I do not.

Q. Or do you know any members of the Rimer family?

A. No sir.

Q. Do you know Mr. Reilly?

A. No I don't.

Q. Or Mr. Fennell who works with Mr. Reilly?

A. No I don't.

Q. Do you know any members of the State Police?

A. No.

Q. Would you like to be on this Jury Mrs. Parks?

[819] A. Well, I'm not crazy about it. Let's put it that way.

Q. Why did you put it that way?

A. The—I just—well, I said from choice say, I would not like to be on the jury. I said I hope I don't get on it but if I do, I'll go. That's it.

Q. When you said you hoped you don't get on this—you had a reason for saying that. Off hand, what was the reason?

A. I just felt—I don't want—not against the case or anything like that. I just felt I wouldn't want to be on it. Not for any technicality or anything like that. Well, it's hard to explain. Like I say, I'm—if I'm to serve I'll serve but truthfully, I don't feel—I'm not crazy about being on it.

Q. Is it because of the nature of the case Mrs. Parks, that you felt you wouldn't want to be a juror or because you just didn't want to be a juror generally, if you can tell me?

A. Well yes. To one sense of the word, but like I told you—in my own mind this morning—I was down at my son's and when I came home my husband says, greetings—you're to be at the Court House at nine o'clock tomorrow morning.

Q. This paper that was delivered was given to your husband and not given to you?

A. Yes.

Q. And what happened then?

A. I said, I said why—no—why did they pick me. And then I said, well, I'll look at it this way. It's my duty to go and if I'm picked to serve it's okay and if I'm not it's okay. That's just the way it is.

[820] Q. Did your son or husband express their opinion as to this matter when they found out you were to come in here and be a prospective juror?

A. All they said, if you're called, just tell them how you feel.

Q. Did you tell them how you felt?

A. No.

Q. Did they tell you how they felt?

A. No.

Q. Mrs. Parks, is there anything that you know about yourself that perhaps I have not had the clairvoyance to touch upon to cause you to think you would not be a qualified juror in this case?

A. Well, I don't know how to answer that, because if I'm—if you qualify me and I'm called I'll do the best I can whether in my mind I feel whether I'm doing right. It's hard to explain just how I feel about it. Now, the only thing I can say is this. If I must serve—not must serve—I just hope that my health holds up. Whether it would cause me trouble I don't know. I got a letter out of Pittsburgh in September to be called for Court down there but I sent the paper back and said I was under the doctor's care and said it would be unadvisable to accept me. It's—sometimes in a case like that they run quite a while. But for me to go down there whether it would

—I'm 62 years old. When a person starts to get up there, you never know. What I mean, whether something might upset you a little bit. It's like the doctors told me the condition I have is something I have to live with and when I have one of the flareups it's pretty bad and other times it's not too bad and I don't make myself an invalid and I try to keep going because it's better for me.

[821] BY MR. KING:

Pass the juror.

BY MR. REILLY:

Q. Mrs. Parks?

A. Yes sir.

Q. I think you were asked this, but do you know the defendant Yount?

A. No I don't.

Q. Do you know any members of his family?

A. No sir.

Q. Do you know David Blakley from DuBois?

A. No I don't.

Q. Do you know Mr. King or Mr. Sabino?

A. No.

BY MR. REILLY:

Pass the juror.

BY THE COURT:

Q. Mrs. Rimer—I'm sorry, Mrs. Parks, do you know any members of the Rimer family?

A. No sir.

BY MR. KING:

Q. Do you know Mrs. Hummel?

A. No.

Q. She was a telephone operator here in Clearfield?

A. No I don't.

BY MR. KING:

Defense accepts the juror.

[822] BY MR. REILLY:

Commonwealth accepts the juror.

BY THE COURT:

The Clerk of Courts will kindly swear the juror.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania vs Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. I do.

BY THE COURT:

Mrs. Parks, you are now seated and sworn as a juror. You will be sequestered, of course, with the other jurors. Your quarters will be provided as well as food. You will not be allowed to communicate with

anyone except as through notes which will be passed upon by the counsel and Court.

I would admonish you not to discuss this case with anyone nor allow anyone to discuss it with you or within your hearing without reporting such an incident to the Court if it should occur. You will not be allowed any television or radio, telephone or anything of that nature. However, the tipstaves and matrons will always be there and you may make your wants known to them. Particularly we would ask you to make a list of your needs and when you have they will get in touch with members of your family and those things will be brought to you. I would assume that perhaps you may notify the tipstaves if the family does not drive, of course, we would hold everyone here until they are [823] able to bring the things to you. Remember, there can be no written communications of any kind between you except that you pass them to the tipstaves who will pass them to the Court and they will be passed upon by the Court and all of counsel. At all times be extremely careful not to talk in a loud voice about the case and do not talk about the case unless you are in the jury room. You will kindly refrain from any discussion of the case in order that you will not be heard by anyone.

With that, you will now be conducted to the jury room where you will make your list please.

We will call a ten minute recess at this time.

5:05 Court recessed.

5:17 Court re-convened. Defendant in Court.

BY THE COURT:

Members of the jury both prospective and seated. We are about to recess for the day until tomorrow morning at nine o'clock. Kindly remember the directions and mandates of the Court that you are not to discuss this case with anyone nor allow anyone to discuss it with you nor to talk about it within your hearing. If any of these things should happen, of course, report them to the Court.

You are now in recess and you will be conducted, the seated jurors, to the bus to be taken to your quarters.

All jurors are to report tomorrow morning at nine o'clock. To those who are prospective, only you seven, kindly report to the rear of the Court Room where you have been seated.

[824] 5:20 P.M. Court recessed.

9:00 A.M., Wednesday, November 11, 1970
Court reconvened.

Defendant in Court.

. . .

[853]

. . .

ALBERT I. UNDERCOFFER called by the Clerk.

BY THE CLERK: Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the

questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

[854] BY MR. KING:

Q. Mr. Undercoffer, where do you live?

A. Clearfield, Pennsylvania.

Q. Whereabouts in Clearfield?

A. 109 North 4th Street. 109 North 4th Street.

Q. How long have you lived in Clearfield?

A. Practically all my life.

Q. Are you married?

A. Yes.

Q. Do you live with your wife?

A. My wife and I have three children, all married.

Q. What are the ages of the children?

A. Well, I have a son 41, a daughter about 30, and a son about 33, approximately.

Q. Do they live in Clearfield?

A. No, one is in St. Mary's, one is in Lancaster — my daughter is in Lancaster and a son in St. Mary's and a son in Virginia.

Q. One got out of Pennsylvania?

A. Yes.

Q. And are you employed sir?

A. I'm retired, as of the first of the year.

Q. As of the first of 1970?

A. Yes.

Q. What did you do before that?

A. I was Office Manager for Pennsylvania Electric Company.

Q. How long did you have that job?

[855] A. I worked with Pennsylvania Electric Company for about forty years.

Q. Was that here in Clearfield?

A. Yes.

Q. May I infer from what you've been saying Mr. Undercoffer that you were born and raised around here?

A. That's right.

Q. Mr. Undercoffer, is your wife employed any place outside the home?

A. She runs the flower shop on North 4th Street – Undercoffer Florist.

Q. Is that her business?

A. Yes.

Q. Has she had that business for a long time?

A. About twenty years.

Q. Do you help around there much?

A. Occasionally.

Q. Mr. Undercoffer, are you familiar with the Yount situation?

A. Yes I am.

Q. You know about it?

A. Yes.

Q. And do you know any members of the Yount family?

A. No I don't.

Q. Are you acquainted with Mr. Reilly?

A. Yes I am.

Q. How do you happen to know him?

A. Well I guess everyone in Clearfield knows Mr. Reilly as the District Attorney.

Q. He's never served you as personal attorney, has he?

[856] A. No.

Q. Have you ever had occasion to deal with him as the District Attorney?

A. No.

Q. Is your knowledge of him just the fact that he happens to be the District Attorney?

A. I believe so yes. We've all known him. This is a small town and everybody knows most everyone else in the families. I know his family and know who they are.

Q. Are you active politically?

A. No I'm not.

Q. Do you belong to any social groups or social organizations?

A. Yes, the Lions Club; Elks; Commercial Travelers.

Q. Mr. Undercoffer, I assume that you have read the newspapers and heard the news broadcasts and television broadcasts concerning the Yount matter?

A. I don't think I have ever heard any TV lately but I have read the newspaper.

Q. I don't mean to restrict it to just lately – back from when this thing came up back about four years ago?

A. Yes.

Q. You remember that?

A. Yes.

Q. I suppose back at that time you were still working at the Pennsylvania Electric Company?

A. Right.

Q. You heard conversations, I presume, about the matter?

[857] A. Yes – yes.

Q. You heard people express opinions?

A. Yes.

Q. And I assume that on occasion you expressed your opinion as well?

A. Yes I have.

Q. Mr. Undercoffer I then ask you, do you have an opinion as to Mr. Yount's guilt or innocence as of now?

A. I would have to answer you in this way. I think that the Court first tried Mr. Yount and then decided he was entitled to a new trial and my opinion is that if the Court says he is then he is. He's entitled to a new trial. But if it were my son or my son-in-law who was a school teacher that was being tried I would want him to have every opportunity to prove his innocence. I believe this.

Q. You'd want him to have an opportunity to prove his innocence. Is that what you're saying?

A. Whether or not he was guilty or innocent.

Q. You'd want him to prove that?

A. Yes.

Q. Well, taking all of these factors into consideration as you have Mr. Undercoffer, would you give it a little bit of thought now and tell me whether or not you have an opinion as of right now, just based upon what you know and have heard and thought about. Do you have an opinion as of right now as to his guilt or innocence?

A. No. I think I would have to hear the testimony of both sides and I think I would form my opinion after I hear the testimony of both sides.

Q. Well, can you explain Mr. Undercoffer or tell me, what occurred [858] between the time that you did have an opinion and now so that now you tell me you do not have an opinion?

A. I think the fact that Mr. Yount has been granted a new trial the Courts feel he is entitled to a new trial—then they must have their reasons. We have to abide by our Courts.

Q. Mr. Undercoffer, do you feel that you would be able to brush completely from your mind any other thoughts or opinions you may have had in the past and set them completely out of your mind if you were asked to be a juror here and render a verdict only on the evidence that would be produced in Court? You'd forget completely about what you ever heard before and base it purely on what you heard in Court and render a verdict on that evidence alone? Would you be able to do that?

A. That's a hard question to answer.

Q. Take your time?

A. It's a little bit like the Court, if somebody makes a statement in Court, the Judge would say, strike that from the record. The jury would be supposed to forget about that. It would be a very difficult thing to do.

Q. It sure is. We have been trying to battle that one for years.

A. I believe for myself—I believe that I could. I would be capable of rendering a fair decision on what I had heard here. I have faith enough in myself.

Q. Mr. Undercoffer are you acquainted with any members of the State Police Department?

A. Yes I am.

Q. Can you tell me who you know?

[859] A. Bill Smith from Punxy.

Q. How do you happen to know him?

A. In relation with bird dogs.

Q. Bird dogs. Is he a bird dog raiser?

A. Well yes I guess. We belong to Beaver Meadow Field Club.

Q. You're a bird dog raiser too?

A. Yes.

Q. Do you know any other policemen?

A. I know Dean Spangler from Clearfield. We've all eaten lunch down to the Elks. I know him yes.

Q. Did you ever hear or were you ever in any discussions where you have heard either of these gentlemen discuss the Yount matter?

A. No.

Q. About how often do you see these gentlemen?

A. I haven't recently since I retired. I don't eat down there as often as I did and I've only eaten there two or three times down there since I retired.

Q. Since your retirement have you had more time to spend with the bird dogs?

A. No. I've been busier than before I retired. That's where I should be right now.

Q. What kind of activities do you follow since your retirement?

A. Well bird dogs are my favorite sport and pastime and I occasionally make a delivery for my wife or help when they get busy and we have remodeled a couple of apartments.

Q. Are they located here in Clearfield?

[860] A. Yes.

Q. Mr. Undercoffer, knowing all the people you know and the type of activity you follow or are engaged in and having heard people express opinions over the years as you have, do you have any kind of second thoughts about any criticism you might be subjected to if you were to maybe render a verdict or decision that you would know would not be in accordance with other opinions you have heard among your friends?

A. No.

Q. It wouldn't affect you at all?

A. Not at my age.

Q. Not at your age. Mr. Undercoffer, if you were to serve with us as a juror for a time, maybe you'd have to be here for a little while, a protracted little while, would it work any hardship on your wife or on you in any way?

A. No, no.

Q. Mr. Undercoffer, is there any reason that you know of that I may not have touched upon why you should not serve as a juror in this case?

A. I don't know of any, no.

BY MR. KING:

Pass the juror.

BY MR. REILLY:

Q. Mr. Undercoffer I am sure you were already asked if you know the defendant personally?

A. No.

Q. Or any members of his family?

A. No.

[861] Q. Do you know David Blakley from DuBois?

A. Yes I do.

Q. How long have you known Mr. Blakley?

A. Well, since I have been in field trial business. We formed a bird dog club about—I suppose about three years ago. Now, I have known of Dave—I believe Dave Blakley and Mr. Ammerman were in partnership together at one time. I knew the names Blakley and Ammerman but I wouldn't know Mr. Ammerman possibly. It's only three years he's belonged to the bird dog association.

Q. Do you ever talk to him or has he talked with you about the case?

A. I imagine it's been mentioned.

Q. Do you specifically recall any incidents where it was mentioned?

A. No.

Q. With your knowledge of David Blakley, your acquaintanceship with him over the past three years or before, would it in any way influence your opinion in this case if you were selected as a juror?

A. No.

Q. Do you know Mr. King or Mr. Sabino?

A. No I don't.

BY MR. REILLY:

Pass the juror.

BY THE COURT:

May I ask some questions—

Q. First, have you been called or served as a juror in the past?

A. No I never have.

Q. And are you acquainted with the Rimer family in any way?

[862] A. No I'm not.

BY MR. KING:

Defense accepts the juror.

BY MR. REILLY:

Commonwealth accepts the juror.

BY THE COURT:

Will you take juror's seat number 10 in the box where you will now be sworn.

Will the Clerk of Courts kindly swear the juror.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania vs Jon E. Yount, defendant, and a true verdict give according to the

evidence and that as you shall answer to God at the Great Day?

A. I do.

BY THE COURT:

Mr. Undercoffer, you are now, you have been sworn and seated in this jury and you will be sequestered from this moment on along with other jurors already selected and with those who will be chosen subsequently, if any.

Now, I want to direct that you not talk to anyone nor allow anyone to talk to you about this case or within your hearing without reporting such an incident to the Court if it comes to your attention. I would also tell you that tipstaves or anyone else are not permitted to discuss the case with you. The jurors in the same case may discuss the matter among themselves. Therefore, I would ask that you not allow anyone [863] else, tipstaves or otherwise to discuss the case with you or within your hearing. If so, you are to report it to the Court. I would also ask that you not make any attempts to contact anyone except through the tipstaves. For instance, if there are things you desire and there will be personal needs, put them on a list and they will bring that to the Court so the Court may pass upon it. Then they will see that your personal needs are brought to you. You are allowed no reading material, no radio or television, nor are you allowed to make any telephone calls of any kind. You will be sequestered at Holiday Inn at DuBois and there you will be quartered and fed except for lunch which you will receive in the Jury Room while you are here in Court. Therefore, will you kindly go to the

jury room now in charge of the tipstaves and matrons and will you make out your list so that they may obtain the things for you. If you desire the delivery of any message of emergency or important nature, you may write out a message, fold it so that the tipstaves can't read it, and they will then bring it to the Court for me to pass upon. They will be passed upon so you'll know who will read it—by both of counsel for Commonwealth and defendant as well as the Court. The tipstaves, of course, will not read it. Alright.

We will now recess for ten minutes.

10:40 a.m. Court recessed.

10:50 a.m. Court re-convened. Defendant in Court.

BY THE COURT:

Let the record note that in compliance with the Order of the Court the Sheriff has produced the Jury Wheel in the presence of counsel for defendant as well as the defendant himself, the District Attorney, the [864] two Jury Commissioners and the Secretary to the Jury Commissioners who were Ordered by this Court to be present at all times during the procedures involving the drawing from the said Wheel the 25 names in the presence of the Court.

It is now directed that the Sheriff proceed to see to the opening of the Jury Wheel with the Jury Commissioners producing the key and that the Sheriff draw therefrom 25 names.

(Names drawn)

* * *

[921]

* * *

ROBERT P. MURPHY called by the Clerk.

BY THE CLERK: Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. REILLY:

Q. Will you state your name?

A. Robert P. Murphy.

Q. Where do you live?

A. DuBois.

Q. Mr. Murphy, how long have you lived in DuBois?

A. Approximately 5 years.

Q. And by whom are you employed?

A. Penn State University.

Q. At the D.U.C.?

A. Yes.

Q. Are you an instructor there?

A. No, I'm a Business Manager.

Q. Are you married?

A. Yes I am.

[922] Q. Have you any children?

A. Yes, one.

Q. Would that be a boy or girl?

A. Girl.

Q. How old is she?

A. Seventeen.

Q. Mr. Murphy, do you know or are you acquainted with the defendant?

A. No I'm not.

Q. Or any members of his family?

A. No.

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. No I have not.

Q. May I assume then Mr. Murphy, if you were selected as a juror you could go into the jury box and base your verdict solely on the testimony and evidence along with the instructions that the Judge would give you?

A. That's true.

Q. And that you would carry no opinion with you into the jury box?

A. No.

Q. Mr. Murphy, do you know Mr. David Blakley?

A. Yes I do.

Q. How long have you known him?

A. Known of him?

Q. Do you know him personally?

A. I met him on one occasion.

Q. Has he ever handled any legal business for you?

[923] A. Yes he has.

Q. Mr. Murphy, would your acquaintanceship or friendship with Mr. Blakley in any way influence your verdict if you were selected as a juror?

A. No it would not.

Q. Do you know Mr. King or Mr. Sabino?

A. No I do not.

BY MR. REILLY:

Pass the juror.

While they are debating—

Q. Did I ask you Mr. Murphy if you know or are you acquainted with the defendant?

A. Yes.

Q. And your answer was no?

A. Correct.

Q. And you know no members of his family?

A. No.

BY MR. SABINO:

Q. Mr. Murphy for how long a time have you been employed by Penn State University?

A. Approximately five years.

Q. And prior to your living in DuBois, which I think was about five years ago, do those two dates – is that coincidental?

A. Coincidental, yes.

Q. You came to DuBois to work, is that correct?

A. Yes.

[924] Q. And where did you live before?

A. Center Hall, Pennsylvania. Approximately 70 miles from DuBois.

Q. For whom were you working at that time?

A. Nationwide Mutual Insurance Company.

Q. Have you read about this matter in newspapers?

A. Yes I have.

Q. Both some time ago and recently?

A. Yes.

Q. And, of course, I trust you also heard about it on the radio and so forth?

A. Yes.

Q. Have you been in discussions or heard discussions where the guilt or innocence of Mr. Yount was the subject?

A. No, not really.

Q. Have you ever heard anyone express to you an opinion as to Mr. Yount's guilt or innocence?

A. I would say no. I would say no to that question, as to guilty or innocence.

Q. Pardon?

A. I would say no to that question.

Q. With respect to the newspaper presentations, you were able to read these newspapers and so forth without forming any opinion of your own. Is that right?

A. I would say yes. I was in no position to judge one way or another.

Q. In other words, are you saying before you can make a decision you want to see the facts yourself, is that right?

[925] A. Definitely.

Q. Mr. Murphy are you acquainted with any members of the Rimer family?

A. No I'm not.

Q. Are you acquainted with any members of the Pennsylvania State Police?

A. Any members of the Pennsylvania State Police?

Q. Yes?

A. Yes I am.

Q. Can you give me their names?

A. Leonard Washkavitch.

Q. Is that the only one?

A. Harry Ellenberger.

Q. Now, are you acquainted—in your acquaintanceship with these individuals—how do you come to know them?

A. I know many more than that but the acquaintances comes from the fact as an Insurance Adjustor I would—I had a lot of contact with them as far as State Troopers in the DuBois area. I began with the two or three I know and from association with other members of their families, not necessarily with them.

Q. Would you characterize your acquaintanceship with Mr. Washkavitch and Mr. Ellenberger as a close relationship?

A. No.

Q. Have you ever been present when the matter of Jon Yount was being discussed by any of these people?

A. No.

Q. Are you familiar—are you aware as to whether or not any of [926] the State Police whom you know have anything to do with the Yount matter?

A. No. I have no knowledge that any I know had anything to do with it.

Q. Can you give the names of some of the others you know?

A. Corporal Barnes who is now retired. Joe Reo, Bill Yobbs. There are others I know that are not in

this area at the present time—either retired or some have gone into the service.

Q. Mr. Murphy are you aware as to where Mr. Yount has been for the past four years?

A. No sir. I would assume possibly he has been in the East State Penitentiary rather than the Western—but I don't know.

Q. For how long were you an Insurance Adjustor with Nationwide Insurance Company Mr. Murphy?

A. Two different times. Six years on two different occasions.

Q. Total six years at two different times?

A. Yes.

Q. Was it interrupted by something?

A. Yes.

Q. Another job?

A. Yes.

Q. What was that?

A. Gavich Manufacturing.

Q. And the office you worked out of at Nationwide, was that at Center Hall?

A. I worked out of Harrisburg.

Q. Was there any particular reason why you assumed that Mr. Yount [927] was in the Eastern rather than the Western Penitentiary?

A. Not really.

Q. Just no reason?

A. No.

Q. You're not aware as to what district Clearfield is in, whether it's in the Eastern or Western district?

A. No, I'm sorry.

Q. Do you belong to any social clubs Mr. Murphy?

A. Lions Club. DuBois Area Lions Club.

Q. Any others?

A. No sir.

Q. Do you have any hobbies or other ways to occupy your time when you're not at work?

A. Yes.

Q. What is that?

A. Fishing and hunting.

Q. Are you a rather avid fisherman?

A. Yes sir.

Q. Where do you most of your fishing in this area?

A. Potter County, Center County, Elk County, Cambria County and Delaware—the State of Delaware.

Q. Do you generally do this fishing alone or with a group of other fellows?

A. Generally with my wife.

Q. With your wife?

A. And—yes and generally two other gentlemen.

[928] Q. Does your daughter live with you?

A. Yes.

Q. Does she go to high school?

A. Yes, DuBois Area High School.

Q. Does your wife work?

A. Yes she does.

Q. Where is she employed?

A. Yost Associates Incorporated in DuBois.

Q. What is that Mr. Murphy—what kind—

A. Consulting engineers—what kind of work
does the firm do?

Q. Yes?

A. A consulting engineering firm.

Q. What does your wife do?

A. She's a Secretary.

Q. Do you have any other relatives in this
vicinity?

A. Clearfield County?

Q. Yes?

A. No.

Q. Are your relatives—were you born and raised
in Centre County?

A. Yes sir.

Q. Have you ever heard your wife express an opinion as to Mr. Yount's guilt or innocence?

A. No sir.

Q. You don't know whether or not she has one?

A. No sir.

Q. Have you ever heard—do you know whether or not your daughter [929] has an opinion as to Mr. Yount's guilt or innocence?

A. No sir.

Q. You don't know or you know that she does not?

A. I don't know if she does or not.

Q. Mr. Murphy are you aware of Mr. Yount's occupation before this matter occurred?

A. Yes sir.

Q. And what was that?

A. School teacher.

Q. And were you aware as to where that was?

A. DuBois High School or Jr. High School—I think it was High School.

Q. Do you have any particular connection with the High School other than that your daughter goes there?

A. No sir.

Q. However, you are connected with education—you're Business Manager for Penn State at DuBois?

A. Yes sir.

Q. Would those factors have any influence on a decision that you might render in this case if you were a juror?

A. No sir.

Q. Mr. Murphy, have you ever fished with Mr. Washkavich or Mr. Ellenberger?

A. No sir.

Q. Can you give me an estimate as to how many times you might have been in the company of these two gentlemen?

A. Over what period of time?

[930] Q. The last four or five years and since you have been here in DuBois?

A. I would estimate maybe 5 or 6 times.

Q. Each or total?

A. Between the two.

Q. In the times when you were with them — were the three of you together?

A. No.

Q. You were with them individually?

A. Yes.

Q. What was the occasion for your acquaintanceship or your meetings — these incidents you just related when you were in company with them? What was the occasion for that?

A. With Ellenberger it's the fact that he belongs to the Lions Club in DuBois. With Washkavich — since

I've been in Clearfield County it's simply been I've run into him on different occasions while he was on the patrol or on his off duty hours.

Q. Has this matter been the subject of any discussions either by Mr. Ellenberger or others at the DuBois Area Lions Club meetings at any time?

A. No sir.

Q. Would your employment or is there anything about your employment or any situation at home which would be adversely affected by your becoming a juror in this case and being away from home and your job for a protracted time?

A. No sir, not really.

Q. Other than you would be a little unhappy about it?

[931] A. Quite possibly if it would run into hunting season.

Q. You hunt also?

A. Yes sir.

Q. Did you have your plans made for hunting this year?

A. Most generally everybody does, yes.

Q. Did you plan to hunt with others?

A. Yes, one or two others.

Q. When does that begin?

A. November 30th.

Q. Do you think your anxiety with respect to getting out for hunting season would have any affect on the ability to judge this situation?

A. No sir.

BY MR. REILLY:

I'm sorry, was that answer no?

A. That is correct.

BY MR. SABINO:

Q. Is there anything else Mr. Murphy, which during my questioning I may have neglected to mention that you are aware of which in your mind would cause you to think that perhaps you should not be a juror in this case—do you understand the question?

A. Yes. There's nothing that I know.

Q. No factors that you are presently aware of that you—that might cause some influence on a decision you might render here?

A. No sir.

Q. I don't know if I asked you this before but did you ever have an opinion about the case at any time—back when it happened or at [932] any time throughout since it happened—did you ever have an opinion about the guilt or innocence of Mr. Yount?

A. No sir. The only opinion I had was about local newspapers.

Q. What?

A. The opinion I had was about local newspapers in the area.

Q. If you don't mind me asking what was your opinion about the local newspapers?

BY MR. REILLY:

Well I think, Your Honor, at this point we will have to object.

BY THE COURT:

Objection sustained. It goes beyond the purposes of voir dire. Voir dire is for the purpose only for determining qualification or disqualifying jurors and we think his opinions concerning the case are very pertinent naturally, and you have been allowed wide voir dire but what he might have thought about the newspaper—therefore, we sustain the objection.

BY MR. SABINO:

Q. Is what you said that you had the opinion about the newspapers and not about the case?

A. That is correct.

Q. And what you read in the newspapers did not cause you to get an opinion about the case itself?

A. No, just about the newspapers.

Q. Do you have any feelings one way or another whether you would like to be on the jury?

A. Yes, I said I don't particularly care for it. I think it's going [933] to involve quite a bit of time and again in relationship to the case itself—this is possibly once in a lifetime for the individuals involved here. I'm concerned with hunting season which is relatively unimportant with respect to the overall picture.

Q. I'm not sure whether I heard.

A. Yes. I have feelings about it as far as being here. You're talking possibly in two, three or four weeks.

Q. Do I understand you wouldn't particularly — correct me if I'm wrong — do I understand you don't particularly want to do it because of the inconvenience and hardship to yourself?

A. It's no hardship but it is inconvenient.

Q. You're not too thrilled about it?

A. No, I'm not too thrilled about it.

Q. But do you think that would affect your decision.

BY MR. SABINO:

Pass the juror.

BY MR. REILLY:

Commonwealth accepts the juror.

BY MR. SABINO:

Defense accepts the juror.

BY THE COURT:

The Clerk of Courts will kindly swear the juror.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania vs Jon E. Yount, Defendant, and a true verdict give according to the

[934] evidence and that as you shall answer to God at the Great Day?

A. I do.

BY THE COURT:

Mr. Murphy, you have now been seated and, of course, sworn as a juror in this case and we would ask you not to discuss this case with anyone nor allow anyone to discuss it with you or within your hearing. If any of these things occur, please report them to the Court. Of course, members of the jury may among themselves—members of the seated jury may discuss the case among themselves but no one else. Even tipstaves who are here to serve you will not be allowed to discuss the case with you. However, they are there to serve you. They are to obtain your personal needs and, of course, you will at the very outset—will make a list of your personal needs for them to obtain for you. If you should have any messages of any kind they cannot be given to any one except that you write out a message, give it to the tipstaves, they will deliver it to the Court and the Court will present it to the attorneys before any answer is given as to whether or not it may be delivered. We would ask that you understand that you will be deprived of radio, television, and telephone. No one is able to contact you personally nor are you allowed, during the course of this case. Therefore, we ask that you be patient with the situation and I might even add courageous but that's how things are. We try to make things as comfortable as possible. We think the quarters are comfortable. They are at the Holiday Inn in DuBois where you will receive your morning and evening meal. Your lunches

will be served in the Jury Room and the tipstaves, of course, will provide [935] you with that lunch. When you are sent to the Jury Room now would you proceed then to prepare the list of things you will want. Likewise, if you need your car delivered, in case you drove over here in your car and there is no one else to get it back for you, contact the tipstaves, and Sergeant Gordon will deliver your car for you. If that's in your mind, kindly inform the tipstaves. Alright.

The Clerk of Courts will kindly draw another juror.

* * *

[987]

IRENE KURTZ called by the Clerk.

BY THE CLERK: Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. REILLY:

Q. Will you state your name please?

A. Irene Kurtz.

Q. Mr. Kurtz?

A. Yes.

Q. Where do you live?

A. Mahaffey.

Q. How long have you lived there?

A. Eleven years.

Q. Prior to that where did you live?

A. Ohio.

Q. Is your husband employed in Mahaffey?

A. No, Pittsburgh.

Q. What does he do?

A. Lineman - construction.

Q. Do you have any children?

A. Yes, one.

Q. Boy or girl?

A. Girl.

[988] Q. How old?

A. Seventeen.

Q. Mrs. Kurtz, do you know or are you acquainted with the defendant?

A. No.

Q. Or any members of his family?

A. No.

Q. Have you formed an opinion as to the innocence or guilt of this defendant?

A. No.

Q. If you were selected to sit as a juror, would you be able to base your verdict solely—only on the testimony and evidence you would hear and the instructions the Judge would give you?

A. Yes.

Q. And that no prior information or idea you may have would enter into your deliberation?

A. No.

Q. Mrs. Kurtz, do you David Blakley, attorney for the defendant?

A. No.

Q. Or Mr. King or Mr. Sabino?

A. No.

Q. Do you live right in the Village of Mahaffey?

A. Yes.

Q. Or is that a Borough?

A. Borough.

BY MR. REILLY:

Pass the juror.

[989] BY MR. SABINO:

Q. Mrs. Kurtz, did I understand you have one child, a girl 17?

A. Right.

Q. And does she live at home with you?

A. Yes.

Q. Is she in high school?

A. Yes.

Q. What high school does she attend?

A. Purchase Line.

Q. Where is that?

A. Indiana County, toward Indiana.

Q. And are you employed?

A. Yes.

Q. Where are you employed?

A. G. C. Murphy in Punxy.

Q. Does Mr. Kurtz commute every day to Pittsburgh?

A. No, he stays away.

Q. He stays in Pittsburgh and comes home—

A. On weekends.

Q. Do you know the name of the company with whom he is employed?

A. H. P. Foley Construction.

Q. Do you belong to any organizations, social clubs, women's clubs or anything of that kind?

A. No.

Q. No clubs?

A. No.

[990] Q. You don't have a tendency that way or you don't have the time?

A. I don't have time.

Q. How do you occupy most of your time?

A. When I work five days a week and keep up the home—and I have a mother dying of cancer—I—in between times have to help them.

Q. Where does your mother live?

A. About three miles from me, Mahaffey R D.

Q. Have you been spending considerable time with her as well as at home?

A. I don't stay. Just back and forth.

Q. Were you working for G. C. Murphy in Punxsutawney in 1966?

A. No.

Q. For whom were you working at that time?

A. I wasn't working at that time.

Q. Was Mr. Kurtz working in Pittsburgh at that time?

A. That's hard to say. I can't—he goes here and there and everywhere. I can't tell you.

Q. Do you recall reading about this situation some time back a few years ago?

A. Yes I read it.

Q. You did read it?

A. Yes.

Q. Did you follow it very closely?

A. No I did not.

Q. Did you also hear reports of it on the radio or television?

A. I wasn't too concerned so I didn't pay too much attention to it.

[991] Q. Was there any reason why you weren't concerned about it. Were you doing other things or what?

A. No. I read it and forgot it. I didn't pay any more attention.

Q. Well, the time when you were reading it, did you have any feeling or idea at that time about the guilt or innocence of the defendant?

A. No.

Q. You did not?

A. No.

Q. The papers did not tend to persuade you one way or another?

A. No.

Q. Were you—are you acquainted with any members of the Pennsylvania State Police?

A. No.

Q. Are you acquainted with any other police officials or local police or otherwise?

A. No.

Q. Do you have any other family besides your mother in this vicinity or County?

A. Yes. I have two brothers and a sister.

Q. Where are they living?

A. The two brothers are in Clearfield County and the sister is in Jefferson County.

Q. The brothers in Clearfield County—do you know the borough or town?

A. One is in Mahaffey R D and the other is Glen Hope.

Q. What do they do for a living?

A. One is—works for Benjamin Coal Company and one is in business [992] for himself as a dairy farmer.

Q. Have you ever had any occasion to hear any opinions expressed by others concerning the guilt or innocence of Mr. Yount?

A. No.

Q. Have you ever heard discussions about the matter where opinions were expressed?

A. I haven't. No. Just never talked about it.

Q. This—was this a conscious effort on your part to avoid talking about this or was this just happenstance?

A. I didn't avoid it—I just never talked about it.

Q. It wasn't because of the situation and what you read about it that you avoided it. Is that right?

A. That's right.

Q. Your sister that lives in Jefferson County—what town?

A. Punxsutawney.

Q. And you drive yourself back and forth to the G. C. Murphy Company in Punxsutawney every day?

A. Yes.

Q. Now, is there anything at home or with your own personal situation that would make it difficult for you to serve on a jury which might be—that might keep you away from home for a protracted time—away from your home and job for a protracted time?

A. Is there what?

Q. Is there anything that would make it difficult for you to be away from your home or job—would that be difficult for you?

A. No.

[993] Q. Your daughter could carry on?

A. I think she could.

Q. As I understand there is just you and your daughter living at home?

A. Yes at home.

Q. Are you familiar with Mr. Yount or any member of the Yount family?

A. No.

Q. Are you familiar with any members of the Rimer family at Luthersburg?

A. No.

Q. Are you acquainted with any people who are familiar with either the Yount or Rimer family?

A. No.

Q. Have you ever been summoned to serve as a juror before?

A. In civil court, yes.

Q. When was that?

A. Three years ago.

Q. Did you serve?

A. Yes.

Q. Are you acquainted with Mr. Reilly, the District Attorney?

A. I know who he is, that's all.

Q. How do you know him?

A. From living in Clearfield County.

Q. Have you ever met Mr. Reilly?

A. No, not personally.

Q. When you say you are acquainted with him, you merely know who he is from pictures. Would you know him if you saw him on the street?

A. Yes, from the last time I was here on civil court.

[994] Q. And the last time did Mr. Reilly try any cases in which you sat as a juror?

A. I didn't sit as a juror. I was back there.

Q. You were spectating?

A. Yes.

Q. And Mr. Reilly tried a case you saw?

A. Yes.

Q. Are you acquainted with Mr. Fennell?

A. No.

Q. The Assistant District Attorney?

A. No.

Q. And you've already stated you are not acquainted with any members of the State Police?

A. Right.

Q. You don't recognize any of the other people in here?

A. No.

Q. For how long a period of time did you serve when you were here three years ago?

A. Three days I do believe.

Q. Have you ever seen Mr. Reilly other than the time you saw him try the law suit in Court?

A. I saw him on the street when I come to town.

Q. Do you come to town very often?

A. Not to Clearfield no.

Q. When you saw him on the street was it in Clearfield?

A. Yes.

[995] Q. And the times you have been here you have seen Mr. Reilly?

A. Occasionally, yes.

Q. Have you had occasion to have any discussion with him?

A. No.

Q. Mrs. Kurtz, where were you when you were summoned to Court to appear today or yesterday?

A. Indiana. I went to Indiana with a girl friend from work.

Q. And who summoned you to come today to Court, do you recall?

A. My daughter gave me the message.

Q. I see. You mean you were not personally served?

A. I wasn't at home, no.

Q. With the summons to appear here?

A. Right.

Q. And did your daughter call you in Indiana and tell you to come home?

A. No.

Q. She just showed it to you when you got home?

A. Yes.

Q. So the only person at home was your daughter when the Deputy came?

A. Yes.

Q. And when did you first appear—was this morning your first day?

A. Yes, this morning.

Q. Did your daughter say when he first came?

A. She didn't say what time or anything.

Q. And you drove over here yourself this morning?

A. Yes.

Q. Would you prefer to be or not to be on the jury in this case?

[1996] A. I think I would rather not be.

Q. Can you give me or formulate a reason why you wouldn't like to be—

BY MR. REILLY:

Well Your Honor, this is all irrelevant.

BY THE COURT:

I think so but I will allow the question.

A. Why I wouldn't like to be?

Q. Yes.

A. First because of my job. That's really the main reason.

Q. Do you have any other reasons?

A. No.

Q. Do you think your job may be jeopardized by your being away?

A. It would depend on how long I was away.

Q. Would you be concerned about that during your service as a juror, both in Court and during deliberations—would you be concerned about the possibility—would you be concerned about your job?

A. I don't think I'd worry about it.

Q. Is there anything—I have been asking you questions for the last 10 or 15 minutes but I often forget a lot of things. Is there anything you are personally aware of, in your own mind, that would give you a reason to think you should not be a juror in this case?

A. No, nothing that I can think of.

Q. Mrs. Kurtz, would your having seen Mr. Reilly in Court briefly, or what your acquaintanceship, such as it is—do you think it would influence any decision you might render in this case?

A. No.

[997] BY MR. SABINO:

Pass the juror.

BY MR. REILLY:

Commonwealth accepts the juror.

BY THE COURT:

The Statute under which we previously operated has been suspended insofar as it applies to criminal trial in the Court of Quarter Sessions and General Jail Delivery of any county. It appears in a statement in fine print below Rule No. 1109. In Rule 1109 it is further stated: All peremptory challenges remaining unexercised after the selection of the principal 12 jurors shall be considered as exhausted and in no case may the challenges reserved for the selection of alternates be added to the number allowed during the principal 12.

May I ask, for the record, of the District Attorney—does he intend then exception or assignment of error by virtue granted with the right to peremptory challenge the last juror previous to this, to the defendant?

BY MR. REILLY:

Well, I'm not going to move for a withdrawal of a juror for a mistrial. No sir, Your Honor, we do not challenge that.

BY THE COURT:

Therefore, we have—you waive that requirement insofar as the last juror was concerned. Do you waive it as to any other peremptory?

BY MR. REILLY:

I do Your Honor.

[998] BY MR. REILLY:

Do I understand then, Your Honor, since the Commonwealth has accepted this juror she may be seated.

BY THE COURT:

She may be. I mean the last juror.

BY MR. REILLY:

We—yes, I can appreciate that—

BY THE COURT:

I wanted to declare this before there was any exercising of any challenge as to this juror. What I'm referring to applies to the previous juror who was peremptorily challenged and permitted,

although the Rule provides that it can't be used. Do you waive any objection to that having been done?

BY MR. REILLY:

Yes I do.

BY THE COURT:

Not as to anything else, of course.

BY THE COURT:

You may proceed as to this juror.

BY MR. SABINO:

I understand what the Court has read.

BY THE COURT:

You don't have a peremptory challenge.

BY MR. SABINO:

Are you saying your ruling in the pre-trial was in error?

[999] BY THE COURT:

And it was in error today until I began to think that I did read this and it is so stated in Rule 1109. It solidified the practice in Pennsylvania—permitting exhaustion or use of the 20 peremptories as to the original 12 and not permitting the assignment of any peremptories to any of the original 12 which are allowable only as to alternates. If exercised they must be exercised prior to the alternates.

BY MR. SABINO:

That being the case, we are without a challenge, as I understand.

BY THE COURT:

You are not challenging under cause—that was the only challenge?

BY MR. KING:

Well, we make a challenge for cause.

BY THE COURT:

Challenge for cause is denied.

Let the record note that there is no exercise of peremptory challenges as to this juror by reason of the fact that the defendant has exhausted the peremptory challenges allowed under the law.

BY THE COURT: (To witness)

You may take Juror Seat Number 12 and be sworn.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania vs Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. I do.

[1000] BY THE COURT:

You have been seated and sworn as a juror in this case of Commonwealth against Jon E. Yount. We ask

that-that you not discuss this case with anyone nor allow anyone to discuss it with you or to discuss it within your hearing except members of the same jury, without reporting such a matter to the Court if it should come to your attention.

You will not be allowed any reading material or radio or television. However, we have the tipstaves and matrons who are here to serve you at all times. They will serve you during the 24 hour period of each day and whatever your personal needs or wants may be you may communicate them to them. They, too, cannot talk to you about the case nor are you allowed to talk about it with them because they have no part in the case anymore than anyone else would have. We ask that you make a list of your personal needs and also if you drove a car over here, we will provide for someone to take that car to your home for you. You may let the tipstaves know about that and give them the keys and it will be taken care of. No messages may be delivered except through the Court. Therefore, you may give any message to the tipstaves in writing but they will be passed upon by the attorneys, both defendant and Commonwealth attorneys and the Court before the Court will take any action. I tell you that so you will know it will be read by all of us before anything will be done in that regard.

We do hope you will exercise patience and consideration. We hope that the quarters and food will be suitable for you. You will be quartered at the Holiday Inn in DuBois where you will be fed two meals a day and you will also sleep there. Your lunch, of course, will [1001] be provided in the Jury Room.

Alright, you may be taken to the Jury Room, there to make your list so that the tipstaves may take care of that.

We will proceed to call the first alternate juror.

(Off record discussion)

The Court will rule that as to the alternate jurors, each of the parties shall have two peremptory challenges.

* * *

[1118]

* * *

JOHN T. HARCHAK called by the Clerk.

BY THE CLERK: Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. REILLY:

Q. Will you state your name?

A. John T. Harchak.

Q. Where do you live?

A. R D Houtzdale.

Q. Mr. Harchak, how long have you lived there?

A. Thirty years.

Q. Are you married?

A. Yes.

Q. Have you any children?

A. One.

Q. Boy or girl?

A. Boy.

Q. How old is he?

A. Eighteen months?

[1119] Q. Mr. Harchak, do you know or are you acquainted with the defendant in this action?

A. No I do not know him.

Q. Or any members of his family?

A. No I do not.

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. No I haven't.

Q. Mr. Harchak, if you were selected as a juror in this case, would you be able to enter the jury box and base your verdict of guilty or innocent only on the evidence and testimony that you would hear along with the instructions that the Judge would give you?

A. Yes.

Q. And you would have no other influencing factors in arriving at your verdict?

A. No, other than the testimony I would hear in this Court Room.

Q. Mr. Harchak, do you know David Blakley, an attorney from DuBois?

A. I do not.

Q. Do you know Mr. King or Mr. Sabino?

A. No I don't.

BY MR. REILLY:

Pass the juror.

BY MR. SABINO:

Q. Mr. Harchack, are you employed?

A. Yes.

Q. By whom?

[1120] A. Department of Transportation — Highway.

Q. And is that the Commonwealth of Pennsylvania?

A. Yes, Department of Transportation.

Q. For how long have you been so employed?

A. Will you repeat that?

Q. How long have you been so employed by the Commonwealth?

A. Since 1963.

Q. And for whom did you work prior to that time?

A. Harchack and Lucas Coal Company and I was self-employed for a period of a few years.

Q. In the coal business?

A. Yes.

Q. Where is your Home Office of the Department of Transportation?

A. Out of Clearfield, District 20.

Q. For—what do you do?

A. Construction Inspector II. We inspect road building.

Q. Does your wife work?

A. No.

Q. How long have you been married?

A. Five years.

Q. And you just had your first child eighteen months ago?

A. Yes.

Q. Have you always been in Clearfield County—always resided in Clearfield County?

A. Yes.

Q. Around Houtzdale area?

[1121] Q. You were employed by the Department of Transportation working out of Clearfield in 1966 were you?

A. '63.

Q. And in '66 you were also?

A. Yes—yes. I didn't say in Clearfield County. We have an eight county area we cover and in '66 I

could have been—it's pretty hard—I think at the time I was in State College or in Centre County area at that time.

Q. Every day you go there from your home?

A. Yes, we could either go there or communicate.

Q. Now, do you know any members of the Rimer family of Luthersburg?

A. No I do not.

Q. You know the connection between Yount and Rimer?

A. Yes and no. I've heard about it. I'd have to answer yes and no.

Q. You—have you ever heard the name Jon Yount?

A. Yes back—this was—right here today but back a few years ago I seen it in the papers.

Q. And do you remember the name Rimer as in connection with that case?

A. Yes—yes.

Q. Now, did you ever read about the situation concerning Mr. Yount?

A. At the time I would occasionally pick up a paper and glance through it. I never did get the paper—not a daily paper.

Q. You never got one at home?

A. Yes, we never got a daily paper at home and if I got one I might scant something or read it to know what was in it.

Q. In the course of your employment with the Department of Transportation [1122] have you run in to some people who discussed the Yount or Rimer matter?

A. To the best of my knowledge I would say no.

Q. You haven't heard any discussions about it?

A. I would have to say no.

Q. Couple of people, or one or two, together somewhere talking about it?

A. No, I would say I have never discussed it with anyone or anybody around me never. It was just never mentioned.

Q. But you do recall reading about it somewhat at the time?


A. Yes.

Q. Do you know whether or not you ever had an opinion at any time concerning the guilt or innocence of Mr. Yount?

A. No I never had an opinion because I never knew the facts.

Q. Did you say — what you're saying — the reason is you didn't have an opinion was because you didn't know the facts?

A. Yes. If I had followed it up in the newspaper I probably would have been able to pass an opinion, but I might have seen one thing and a couple of days seen something else so I truthfully couldn't pass an opinion on it.



Q. Well now, keep in mind, when we ask if you have an opinion, we don't ask you whether you know whether he is guilty or innocent, or if you know enough about it to substantiate a decision. Just opinion now, your opinion, impression, or feeling as to whether he might be innocent or guilty. I'm not asking what your decision might be in the case or whether you know enough to make a decision. I'm just asking you on the basis of what you do know—if you have a feeling [1123] or impression about Mr. Yount's guilt or innocence?

A. No.

Q. Mr. Harchak, are you acquainted with any members of the Pennsylvania State Police?

A. Yes.

Q. Would you give us the names of those people?

A. I have an Uncle, Andrew Harchak, a State Policeman.

Q. Does he hold rank in the State Police?

A. He does but I couldn't tell you what it is right now.

Q. Since he's your Uncle I assume he's a little older than yourself. Has he been in the Police for a long time?

A. Roughly, I'd say twenty-three years.

Q. Any other members of the State Police of whom you are acquainted?

A. No.

Q. You do not come in contact with Pennsylvania State Police in your employment with the Department of Transportation?

A. No, I do not.

Q. Have you ever heard your Uncle discuss the matter of Mr. Yount?

A. No.

Q. Do you see your Uncle pretty often?

A. Just depends—I might see him once a month. Sometimes driving, but as far as talking to him—once a month—rarely.

Q. Do you think the fact that your Uncle is a member of the State Police would influence a decision you might render in a criminal case?

A. No.

Q. Would you be willing to sit on a jury which—and make a decision [1124] which might be contrary to an opinion which might be held by your Uncle?

A. Would you repeat that?

Q. Do you feel that you could serve on a jury and render a decision which you know or may feel would be contrary to an opinion of your Uncle?

A. No.

Q. I'm sorry, do you mean no you would not be influenced or no you could not be on a jury and render a decision?

A. I could be on a jury.

Q. Yes?

A. It wouldn't influence me.

Q. You could render a decision which you know might be contrary to your Uncle's opinion?

BY MR. REILLY:

I think that's an objectionable question. He's already indicated that his acquaintanceship or relationship to—

BY THE COURT:

I believe it might be a proper question. I want it, but more clearly. I don't think the witness understands it.

Q. May I ask you this. If you knew your Uncle to have an opinion about a case—this case—

A. Yes.

Q. Yes and you were on the jury, could you come to a conclusion contrary to your Uncle's opinion?

A. No, what his opinion would be and what mine would be—

Q. You wouldn't be bound—

[1125] A. No, not by my Uncle's saying one way or the other. I'd have to base my own opinion on what I would hear in this Court Room.

Q. Mr. Harchak, are you a member of any clubs, social clubs, or fraternal organizations?

A. Yes.

Q. Which?

A. A social club?

Q. Yes?

A. Well, I belong to the Veterans Administration. That's actually the only one I belong to.

Q. Do you have any—do you mean the Veterans of Foreign Wars?

A. Yes.

Q. Do you—what do you do—or do you have any hobbies or activities you take up other than your employment?

A. Interested in hunting—sports.

Q. Do you follow this hobby pretty well?

A. When the seasons are in—mostly hunting. Not fishing or nothing, strictly hunting.

Q. Mr. Harchak, are you aware of any hardship you might undergo health-wise or family-wise which might occur as a result of your serving on a jury and being away from your home and job for a protracted period of time?

A. Would you repeat that please?

Q. Would your serving on a jury create any hardship insofar as your own health or your family's health or your job if you were to be on a jury and be with us and away from your home and job for a certain amount of time?

[1126] A. No.

Q. May I ask if you would prefer or not prefer to be on a jury of this case?

A. I don't know how to answer that question, because I was under the impression that when I was subpoenaed to be here to be picked that it was up to the attorneys to decide whether they figured I'm capable to be on the jury.

Q. That's true. My question is do you have any preference—would you like to be on the jury?

A. Yes.

Q. You would?

A. Yes.

Q. Is there any particular reason why you would like to be on the jury?

A. No. I was subpoenaed to be here and I feel if I'm selected I would. I don't want to—back that up a little bit—

Q. My question is, would you like to be on the jury?

A. Yes.

Q. My next question was—was there any particular reason why you want to be on the jury?

A. No.

Q. Why would you rather be on the jury than not be on the jury?

A. I figure—like I said—as a taxpayer of this County—that is my duty or obligation once I'm selected as a jury.

Q. You have a duty to be on the jury?

A. Not on the jury—to be picked until you go onto the jury or until—whether you're picked or not picked.

[1127] Q. I'm sorry, I lost you on that.

A. Like I said. When I was subpoenaed to be here and my name drawn from the Wheel I appeared here. As far as being on this case I would prefer to be on it.

Q. And I'm not sure whether or not you answered my last question. If you did I missed it about why or—do you know why you would like to be on the jury—keep in mind why you would like to be on the jury, not why you showed up here by subpoena like a law abiding citizen?

A. I don't know why. It's—it's not for me to decide whether I'm on that jury or not.

Q. Are you acquainted with Sheriff Charney?

A. No, I know Mr. Charney.

Q. Who—when did you receive your notice to appear here today?

A. It was about 12:55 or 1 o'clock p.m. Saturday.

Q. By whom were you served the—

A. The Sheriff, William Charney.

Q. And was there any conversation between you and Mr. Charney at that time concerning your service here?

A. No.

Q. Did he—he merely gave you the notice?

A. He came to the house—Mr. Charney happened to stop at my father's house and he walked in and said, congratulations, and zappo—and he said immediately, and I said—you're kidding and when I opened it it said right on there—and I came down here.

Q. Did you come by yourself?

A. Yes.

[1128] Q. Did Mr. Charney leave before you left?

A. Yes.

Q. Are you acquainted with Mr. Reilly, the District Attorney?

A. I know of Mr. Reilly.

Q. How do you know Mr. Reilly?

A. Well, he has taken care of some business for us in his private—

Q. He has taken care of some private law business for you?

A. For an organization.

Q. What organization?

A. The Morann Citizens Club. That's one I forgot.

Q. It's an organization you forgot to mention to us?

A. Yes.

Q. Are you an active member of the Morann Citizens Club?

A. Yes.

Q. Do you hold an office?

A. Yes.

Q. What office?

A. President.

Q. You're the President of the Morann Citizens Club?

A. Yes, right.

Q. And you forgot to mention that when you mentioned you were a member of the VFW?

A. We just held our election of officers. Actually, I'm not President now. It takes effect the 1st of the year. Right now, I'm a Trustee.

Q. Now, you're President Elect?

A. Yes, since October. I was elected in October.

[1129] Q. How many members does that organization have?

A. I think 68 regular members and I think there's 96 social members. That's to the best of my knowledge.

Q. And what does this Club do?

A. It's just for the citizens in the area—just a local club. They give out Christmas trees to the children and for Halloween they give out different treats for the kids.

Q. Do you have a club house or a meeting place?

A. In the back end of the place.

Q. What place?

A. Morann Citizens Club, there's a bar in one place and the back room. It used to be a dance hall.

Q. And how long have you been a member of that Club?

A. Nine years.

Q. During that time you never heard anybody in that Club at any meetings or otherwise discuss the Yount case?

A. No, I didn't hear.

Q. Are you aware of any feelings or opinions held by members of that Club—are you aware of the feelings of the members in that club towards this case?

A. No.

Q. Do you have to talk to a lot of people or campaign to become President of the Citizens Club?

A. No. In fact, no one this year wanted the job so some of us younger fellows went to the meeting and they just voted us in.

Q. Have you known—Have you ever talked to Mr. Reilly in connection [1130] with—

A. Yes.

Q. Have you seen him more than once?

A. Oh yes. I would say—I would have to say I have seen him more than once.

Q. Is he a member of your Club?

A. I couldn't answer that. I never checked the social list.

Q. Do you know Mr. Reilly any other way other than him having done some business for this club?

A. I would have to say yes to a degree. I have never contacted Mr. Reilly personally but I have, through different political things I have worked for him.

Q. You have worked for his election as District Attorney?

A. Yes.

Q. Are you acquainted with Mr. Fennell?

A. No I'm not.

Q. Are you aware—I trust that if you were a juror in this case you are aware that Mr. Reilly would try this case as District Attorney of Clearfield County, are you not?

A. I am aware of this.

Q. Have you ever been a juror before or have you ever been summoned before?

A. Yes, I have been a juror before.

Q. You were?

A. Yes.

Q. When was that?

[1131] A. I believe two years ago in May.

Q. Do you recall if—was that in civil or criminal court?

A. I—it was criminal.

Q. Did you sit on a case?

A. Yes.

Q. Do you recall the kind of case it was?

A. Something about some guy burglarizing some camps down here in Clearfield somewhere.

Q. And Mr. Reilly tried that case?

A. Yes. I couldn't say whether Mr. Reilly tried that case or his Assistant. I'm really—I couldn't tell you, as to whether Mr. Reilly did or his Assistant. It was a Commonwealth case.

Q. Have you ever seen Mr. Fennell before to-day?

A. Yes, but I can't place it—there was a lot of cases that day and he would be on one and somebody on another.

Q. There was more than one case?

A. Yes. We were in the back and I sat back there and listened to the other cases.

Q. Mr. Harchak, do you think your acquaintanceship with Mr. Reilly and the fact that he would be trying this case would influence your decision in any way?

A. No.

Q. Do you think you could arrive at a decision which would be contrary to the position taken by Mr. Reilly in this case?

A. Yes, I could arrive at a decision.

Q. Now Mr. Harchak, you now remembered you belong to the Morann [1132] Citizens Club. Is there any other club besides those two?

A. No.

Q. Do you come into Clearfield very often?

A. No.

Q. This office you work out of in Clearfield—is that in downtown Clearfield?

A. Right now I'm in another County and when they transfer they just pick up a phone and say report to such and such a job. You may not be in that office for 4 or 5 or 6 months or a year or two.

Q. Do you belong to any health clubs, or sports-mens clubs in Clearfield?

A. No.

Q. Mr. Harchak, do you have some brothers or sisters in Clearfield County?

A. No.

Q. No others—mother and father?

A. My mother and father live in Clearfield County.

Q. Are they up in years?

A. Well—in their 50's.

Q. What does your father do?

A. He's a Mine Foreman.

Q. Is he still employed at the same coal company you were previously?

A. No, he works for another company.

Q. The Harchak Coal Company—

A. Harchak and Lucas that was.

Q. That was previously your father's company?

[1133] A. Yes.

Q. As a member of the Morann Citizens Club of which you are President Elect and which has approximately 164 members give or take a few, 68 of which are regular—now, would you be influenced or would there be any pressure on you to arrive at any particular decision in this case taking into consideration what you think the feeling of these people might be that you have to go back to and face as President after this?

A. Would I what?

Q. Would the fact that you're going to be President and you are going back to the Citizens Club which has a lot of members—would these factors influence you in arriving at any particular decision in this case?

A. No.

Q. You wouldn't feel any pressure or influence as being President of that Club?

A. No I can't see how.

Q. A little while ago, Mr. Harchak, you mentioned that—in response to one of my questions in regard to whether you wanted to be a juror, you said

that your name had been picked from the Jury Wheel and you were served with a summons and you felt it was your duty to come. How did you know your name was picked from the Jury Wheel?

A. Well, this I was always under the impression it was the proper procedure how they picked people.

Q. This was an assumption on your part?

A. Yes, I always understood this because I questioned it years ago how people could be picked and they said your name has to be in that box or Wheel and they pick them out of it. And, I was Precinct Chairman [1134] for a few years and I think it was the County Commissioners would send me a list of names of people of the area—if they wanted to become eligible for jury duty—and I would contact people and if they wanted I would write their name in and they would bring it in and submit it into the box.

Q. And the people that you would contact, would you actually contact these people and see if they wanted to be on or not?

A. Not necessarily. If I wanted to that was alright to.

Q. What?

A. I didn't have to go out and contact them, no.

Q. How would you know?

A. Many different people in the area say—how do you get on jury duty. I think finally it was brought out that they sent letters out to the Precinct Chairmen and this is—

Q. You would make a decision?

A. I didn't make no decision. If I'd see someone I'd say, do you want to be on jury duty—if they said yes I'd say, here sign this and if they said no I'd forget it.

Q. Mr. Harchak, we have been talking now for about a half hour and we often miss a lot of things that we may have liked to cover but we don't know certain areas to get into or whatever. Do you know any reason or do you have a reason in your own mind that you are aware of which you as an honest citizen would feel should prevent you from being on this jury in this particular case—is there anything I haven't discussed that you know and I don't?

A. No.

[1135] Q. Something that in your mind would make it—that you would reach the conclusion in your mind that perhaps you should not be a juror in this case?

A. No I'd say.

Q. You can't think of anything?

A. No.

Q. Have you ever been involved in a voir dire before Mr. Harchak, like the one we are going through now or familiar to this when you were picked the last time?

A. No.

Q. You weren't asked to answer questions like this?

A. No.

Q. Have you ever had any discussion with anybody about the type of questions asked in this type of thing?

A. No.

BY MR. SABINO:

If the Court please—on the basis of the—
Pass the juror.

BY MR. REILLY:

Commonwealth will accept the juror.

BY MR. SABINO:

On the basis of the totality and the relationship with the District Attorney and the State Police and the rest of the answers, defendant would challenge for cause.

BY THE COURT:

Challenge for cause is denied.

[1136] BY THE COURT:

You will kindly step down to be seated in Seat Number 3. You are replacing Juror Number 3 who has been excused from duty.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania versus Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. I do.

BY THE COURT:

Mr. Harchak, you have now been seated and sworn. You will retain that seat at all times during the trial. We ask that you not discuss this case with anyone nor allow anyone to discuss it with you, or within your hearing. If any of these things should occur please report them to the Court. The tipstaves will answer for obtaining your personal needs. You will give them a list which you will make up. You are not allowed to communicate with anyone but you may tell them what you need in the way of personal things or if you should become ill, you will notify them and there will be something done about it. If you have an automobile that you drove here we will see to it that it is driven back to your home or wherever you tell us to deliver it. We would like to do that through the day and, therefore, we would like you to notify the tipstaves in that regard. You will not be allowed any reading material nor letters. You are not allowed any radio or television or telephone or to communicate with anyone except the tipstaves and only with them insofar as their looking after your needs [1137] are concerned and keeping you under sequestration. Please do not make any attempt to break any of these rules because it would be a violation of law if you would do that.

You will now be conducted to the jury room.

(All seated jurors returned to Court Room and also prospective jurors)

BY MR. KING:

May I approach the Bench, Your Honor.

(All counsel approach the Bench)

BY THE COURT:

This Court is about to recess and will recess until 1:45—1:45. The reason for change in the recess is, the hour, is the fact that we are recessing 15 minutes later than usual and in order to give the jurors sufficient and proper time to have their lunch we are giving you the same amount of time and, therefore recess until 1:45. Remember, Members of the Jury, you are not to discuss this case with anyone nor allow anyone to discuss it with you nor is anyone to talk about it within your hearing. If any of these things should occur, please report them to the Court.

12:15 p.m. Court recessed.

1:47 p.m. Court reconvened. Defendant in Court.

* * *

[1161]

* * *

DAVID J. CHINCHARICK called by the Clerk.

BY THE CLERK: Defendant look upon juror; juror look upon defendant.

You do swear by Almighty God, the searcher of all hearts, that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

BY MR. KING:

Q. You are Mr. Chincharick?

A. Yes.

Q. And where do you live sir?

A. In Ginter.

Q. Where is Ginter?

A. It's about four miles from Houtzdale—a little town.

Q. Four miles from Houtzdale?

A. Yes.

Q. East, South, North, West?

A. It would be East of Houtzdale.

[1162] Q. East, on what road is that?

A. That's 53 that comes from Houtzdale to Ginter.

Q. How long have you lived in Ginter?

A. Forty-seven years.

Q. What?

A. Forty-seven years.

Q. That's your home?

A. I built a home on a farm where my mother lives.

Q. Did you build your home right on your parents' farm?

A. Yes.

Q. Right on the farm?

A. Yes.

Q. And are your parents still living?

A. My mother, yes.

Q. Are you married?

A. Yes.

Q. And you live with your wife?

A. Yes.

Q. At this place in Ginter?

A. Yes.

Q. Is that out in the country?

A. It's out of town on a farm between Ramey and Ginter. It's a little farm.

Q. And do you have any children?

A. Yes, three.

Q. What are their ages?

[1163] A. Barb is 27, and Connie is 24, and Denise is 13.

Q. Where do they live?

A. They live—the ones that's married lives in Linden, New Jersey, Connie—

Q. Lives where?

A. Linden, New Jersey.

Q. Is that the eldest?

A. Next to the eldest, the one that's 24.

Q. The one that is 27?

A. She lives in Rahway, New Jersey.

Q. And the one 13?

A. She is at home.

Q. Does she go to school?

A. Yes.

Q. Mr. Chincharick, what do you do?

A. I operate a cutting machine in a coal mine.

Q. For what company?

A. Elliott Coal Company.

Q. Where are they located?

A. Osceola.

Q. Where is the mine in which you work?

A. In Ginter, Rosemary Mine.

Q. And for how long have you been doing that?

A. Thirty years in coal mining.

Q. Is your wife employed outside the home?

A. She works at the new school in Madera—
Moshannan Valley.

[1164] Q. Where?

A. In Madera.

Q. What does she do?

A. She takes care of the offices and cleans up.
She's a clean up lady.

Q. Does she do this at night?

A. She goes at seven o'clock in the morning.

Q. Do you do any other kind of work besides run a coal cutting machine?

A. Well I—roof bolting machine—bolting the roofs.

Q. Outside of the mine, you don't have any other kind of employment?

A. No.

Q. Do you belong to any organizations or social clubs of any kind?

A. No.

Q. Any Veteran organizations?

A. No.

Q. No hunting or fishing—

A. Hunting and fishing, yes.

Q. What hunting and fishing clubs do you belong?

A. I don't belong to the clubs but I hunt and fish.

Q. But you engage in those sports?

A. Oh yes.

Q. Have you been hunting this year?

A. I was out two days.

Q. Did you get your turkey?

A. No, I seen one but didn't get it.

Q. When you go hunting and fishing Mr. Chincharick, do you go in company with other men?

[1165] A. No, this year I went by myself hunting turkey.

Q. And the years before this year did you go with other people?

A. For turkey, no, by myself.

Q. For hunting anything?

A. For deer my son-in-laws come in.

Q. And do you have a regular group with which you go hunting, do you have a camp or anything?

A. No we don't have a camp.

Q. Mr. Chincharick, do you have a television and radio at home?

A. Oh yes.

Q. And do you read the newspaper?

A. Oh yes, we get the paper.

Q. Mr. Chincharick, you're familiar with the matter that we are talking about. You know why you're here?

A. Yes.

Q. And I think His Honor said this morning it is the matter of Jon Yount but you knew this before you came?

A. Yes.

Q. Do you recall when this matter came up back four years ago—back in 1966?

A. Yes.

Q. You read about it and heard about it then?

A. Yes.

Q. And you heard people talk about it?

A. Yes at the job in the mine.

Q. It was a matter of pretty general discussion, was it not?

[1166] A. Yes.

Q. And you heard these people express opinions and their ideas about it?

A. Yes.

Q. And I suppose likewise Mr. Chincharick, on occasion you expressed your opinion about it, did you not?

A. Yes.

Q. Mr. Chincharick, do you still have an opinion about Mr. Yount's guilt or innocence as you did before?

A. Yes.

Q. You do?

A. Yes.

Q. And that opinion is a firm and fixed opinion, you're sure of what it is?

A. Yes.

Q. And it's set in your mind. Is that right?

A. Yes.

Q. And Mr. Chincharick, if you were to be a juror on this case would you hear whatever evidence you heard and then decide the case based on that evidence as well as on the opinion that you have?

A. Yes.

Q. And you could not put this opinion out of your mind before you were to be a juror. Is that right?

A. Well, yes.

Q. And you would not decide the case only on the evidence but you would also use it to weigh it against the opinion. Is that right?

A. Yes.

[1167] Q. In other words Mr. Chincharick, you would not be able to put that opinion aside and base your decision only on the evidence you would hear in Court but you would use that opinion as well as the evidence. Is that correct?

A. Yes.

BY MR. REILLY:

Your Honor, on this question as in all of the past questions put to most of the witnesses we've had—I feel we should let the witness testify. Let the witness give his answer and not have counsel for defendant testify for them.

BY THE COURT:

I agree. Especially when it isn't cross-examination.

BY MR. KING:

Well, before Your Honor rules, if I may submit, I believe the rhetorical questions and the rhetorical manner in which they are asked make it necessary to ask these questions in parts and I submit that—

BY THE COURT:

I quite agree with the District Attorney's opinion. You are designating the answers by leading and I think that's true. I don't know if that's what's bringing forth the answers. I think his objection is well taken, especially when it's not on cross-examination. I think he can ask the questions and then he can give you his answer without suggesting the answer in the question.

BY MR. KING:

Q. Mr. Chincharick, you told me that you do have an opinion. Is that correct sir, you said you have an opinion—is that right?

[1168] A. Well you mean about what went past before?

Q. Yes?

A. Just what I read in the paper you know.

Q. Regardless of what it is based on, the question is, do you have an opinion—yes or no?

A. Yes.

Q. Yes. And can you put that opinion out of your mind?

A. Well I have had it in all the time, from what I read.

Q. Would your answer to my question then, therefore, be "no". You could not put it out of your mind?

A. It's pretty hard.

Q. Pretty hard. No matter what you were to hear you would still have that opinion. Is that correct?

A. Yes, I believe so.

BY MR. KING:

Pass the juror.

BY MR. REILLY:

Q. Mr. Chincharick, if you were chosen to sit in this jury box as a juror to decide the guilt or innocence of this defendant would you be able to base your opinion, that is, your verdict, only on the evidence and testimony you would hear and the instructions from the Judge?

A. Yes.

Q. Now do I understand Mr. Chincharick that in basing it only on the evidence and testimony and the instructions from the Judge you would be able to set your opinion aside and consider only the evidence and testimony and what the Judge would tell you?

[1169] A. Yes.

Q. Do you know the defendant in this case?

A. No.

Q. Or any members of his family?

A. No.

Q. Do you know David Blakley, an attorney from DuBois?

A. No.

Q. Have you ever met Mr. King or Mr. Sabino?

A. No.

BY MR. REILLY:

Pass the juror.

BY THE COURT:

Q. Mr. Chincharik, I want to be sure you have understood. The procedure is that if you are chosen as a juror you are seated and you are sworn to try the case and to return a just and true verdict according to the evidence. Is that understood?

A. Yes.

Q. Could you even though you have an opinion, listen to all the evidence and after you have heard the evidence, decide the case solely on that evidence and cast aside your opinion?

A. Yes.

BY MR. KING:

Q. Mr. Chincharik, what does the word "solely" mean?

A. I don't know.

Q. You don't know. When the Judge asked you a second ago could you decide the case solely on the evidence, you don't know what the word [1170] solely means?

A. Yes.

Q. So you don't know what the Judge meant when he asked that question. Is that correct?

A. Not that word, no.

Q. You don't know what that word means. That means you don't understand what the Judge asked you?

A. I understood all except that one word.

BY THE COURT:

Q. Did you understand the word "only"? Could you decide the case only on the evidence?

A. Yes.

BY MR. KING:

Q. Do I understand then, Mr. Chincharick, that you can put this opinion that you have out of your mind?

A. Well, if I heard the case. I just went by the paper, what I seen in the paper.

Q. Do I understand you would require evidence to be presented before you could put this opinion out of your mind. Is that what you mean?

A. Yes.

Q. And until you heard evidence you would not put the opinion out of your mind. Is that what you're telling us?

A. Yes.

Q. Mr. Chincharick, do you know any members of the State Police?

A. Only Andy Harchack is the only one I know.

Q. You do know Andy Harchack?

[1171] A. Yes.

Q. Do you also know John Harchak?

A. Yes.

Q. How do you know John Harchack?

BY MR. REILLY:

Your Honor, it is my understanding under the ruling of the Court last week, once the juror was passed, no new matters could be presented.

BY THE COURT:

I allowed the other questions but I don't believe that this is pertinent to this issue at all. We are dealing with qualifications and I don't believe it falls in the qualifications.

BY MR. KING:

I follow the rule of law that when a new subject comes up which appears to be pertinent it may be examined into.

BY THE COURT:

It wasn't a new subject when he said he knew the State Police. I don't believe anybody else inquired. I think you pursued the inquiry but I am letting you inquire as to anything pertinent but certainly not where it isn't pertinent. I don't believe this is pertinent to this inquiry as to whether he knows John Harchak, I believe was the name, or whatever the names were.

BY MR. KING:

Q. Do you know any other State Policemen besides Mr. Harchack?

A. I don't know their names, you know. Just to see them but I don't know their names.

[1172] Q. As you look around the room, do you see any State Policemen whose faces you recognize?

A. (Witness points)

Q. You pointed to the gentleman sitting at the table. Do you recognize his face?

A. Are you a State Trooper?

Q. Do you recognize the gentleman we affectionately know as Mr. Bedford?

A. Just by passing through by automobile.

Q. Do you know Mr. Reilly the District Attorney?

A. No.

Q. Or Mr. Fennell his able Assistant?

A. No.

Q. Mr. Chincharick, have you ever been summoned or called as a juror before?

A. No.

BY MR. KING:

Defense challenge for cause.

BY THE COURT:

Defense's challenge for cause is denied.

BY MR. REILLY:

Commonwealth will accept the juror.

BY THE COURT:

Very well. You will take Alternate Juror's Seat Number 1 and you will be sworn by the Clerk of Courts.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and [1173] true deliverance make, between the Commonwealth of Pennsylvania versus Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. I do.

BY THE COURT:

Mr. Chincharick, you have now been sworn and seated as Alternate Juror Number 1, and at all times during the trial of this case you will be seated in that same seat. There will be another juror seated to the rear of you but you will take that seat at all times. During the whole of this trial you are ordered not to discuss this case with any one nor allow anyone to discuss it with you or within your hearing. If any of these things come to your attention, please report them to the Court.

I want you to know too that you will be denied the use of radio, television and reading material and you will be sequestered at all times with the other members of the Jury. We think you will be comfortable. We hope so. You will be sequestered at the

Holiday Inn Motel at DuBois where you will be fed your morning and evening meals. During the day you will eat your lunch over here. You are not to attempt to communicate with anyone nor is any one allowed to communicate with you, except that you are allowed to write out your personal needs and we will obtain them for you and if you drove your car over here today we will see that the car is returned to your home or wherever you direct it to be returned. Anything that is written must pass the inspection not only of the Court but the attorneys so if there is anything you write out to have delivered to the Court, remember that the jury—I'm [1174] sorry, the tipstaves and matrons won't read it, but the two attorneys and the Court will and we will decide whether such messages may be delivered and there can be no letters of any kind passed back and forth. I am only referring to emergency matters that you might decide should be taken care of. Whatever your personal needs may be now, would you please write them out after you are in the jury room. Also please tell the tipstaves what you want them to do with your car and those instructions will be delivered to us and we will examine them.

Alright.

BY MR. SABINO:

If the Court please, before I forget—I would like to make something—something that Mrs. Rokowsky said. She said she was summoned by a Constable by the name of Young.

BY THE COURT:

She said she didn't know. Robert Young was actually a Deputy Sheriff. You can check that downstairs. He is a Constable but was designated a Deputy Sheriff. He has designated something like 18 nice jackets so he now has 18 nice deputies.

LaVERNE B. PYOTT called by the Clerk.

BY THE CLERK: Juror look upon defendant; defendant look upon juror.

You do swear by Almighty God, the searcher of all hearts that the answers you shall make to the questions asked you concerning your qualifications as a juror, shall be the truth, the whole truth, and nothing but the truth, and as you shall answer to God at the Great Day?

A. I do.

[1175] BY MR. REILLY:

Q. Will you state your name please?

A. LaVerne B. Pyott.

Q. And is it Mrs. Pyott?

A. Yes.

Q. Where do you live?

A. Burnside.

Q. How long have you lived there Mrs. Pyott?

A. Twelve and a half years.

Q. What is your husband's occupation?

A. He's a funeral director.

Q. Have you any children?

A. Yes, two.

Q. What are their ages?

A. A daughter almost 13 and a girl 8. Two children.

Q. Both girls?

A. Yes.

Q. Mrs. Pyott, do you know or are you acquainted with the defendant in this case?

A. No.

Q. Or any members of his family?

A. No.

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. Sort of.

[1176] Q. If you were selected to sit on the jury in this case, would you be able to base your verdict only on the evidence and testimony that you would hear along with the instructions from the Judge?

A. If I had to, yes.

Q. And you would be able to put your opinion aside and not base your verdict—or not consider your opinion in arriving at your verdict. Is that correct?

A. Yes.

Q. Do you know Mr. David Blakley from DuBois?

A. No.

Q. Or Mr. King or Mr. Sabino?

A. No.

BY MR. REILLY:

Pass the juror.

BY MR. KING:

Q. Mrs. Pyott, you've lived in Burnside for 12 years I understand?

A. Yes.

Q. Where did you live before?

A. Philadelphia.

Q. And Mrs. Pyott, where is your home?

A. Well we were raised in Reading and then we were married in Reading and moved to Philadelphia while he was going to College.

Q. To Mortician's School?

A. Yes.

Q. And he went to school in Philadelphia then, I understand?

A. Yes.

[1177] Q. And after leaving Philadelphia you and your husband came to Clearfield County?

A. Yes.

Q. And you and your husband were both raised in—

A. Reading.

Q. In Reading?

A. Right.

Q. Do you have any relatives around this area?

A. No.

Q. Just you and your husband and children?

A. Yes.

Q. Where do your little girls go to school Mrs. Pyott?

A. The one goes to Purchase Line High School and the other to McGees Mills Elementary.

Q. Does Mr. Pyott have any employment other than being in the funeral business?

A. Yes. He just started this Fall driving school bus.

Q. Driving School Bus?

A. Yes.

Q. You say he just started this past September?

A. The last week of August our school started.

Q. The last week of August—and before he did that, did he have any other line of endeavor other than the mortician business?

A. No.

Q. This place that you live in Burnside Mrs. Pyott, is that the funeral home?

A. No, we live about two blocks away from the funeral home.

[1178] Q. And is your husband in the business by himself or does he have any partners?

A. He owns it by himself.

Q. Do you have any employment Mrs. Pyott, outside the home?

A. Yes.

Q. What is that?

A. I'm part-time secretary.

Q. Part-time secretary?

A. Yes.

Q. Where do you do that?

A. In Barnesboro.

Q. In Barnesboro?

A. Yes.

Q. For whom do you work?

A. An insurance agency.

Q. Does it have a name?

A. Well, it's in the process of incorporating right now. It's Jones Insurance and if they incorporate it it will have another name.

Q. How long have you been doing that?

A. Just for a month.

Q. I assume you have a radio and television at your house?

A. Yes.

Q. And you read the newspapers?

A. Yes.

Q. And you're familiar with the matter that we're talking about here, are you not?

[1179] A. Yes.

Q. And over the years, particularly the last four years, 1966 up to now you heard about the matter concerning Mr. Yount, have you not?

A. Yes.

Q. And I don't know if anyone asked you, but I assume that you do not know Mr. Yount personally or any members of his family?

A. No I don't.

Q. Do you know any members of the Pamela Rimer family?

A. No.

Q. Do you know any members of the State Police?

A. I don't think so.

Q. Now over the years I think you told me, you have heard people discuss this Yount matter, have you not?

A. Yes.

Q. You have heard opinions expressed?

A. Yes.

Q. And I think you mentioned a few minutes ago that you had an opinion, is that correct?

A. Yes.

Q. You do, and are you—is it a definite opinion?

A. Well, I don't know all the facts.

Q. We're not asking you to decide the case. We're just asking if you have an opinion about it?

A. I guess I do.

Q. Yes. Based upon what you have read or heard you have an idea in your mind about it?

[1180] A. Yes.

Q. That's what we call an opinion?

A. Yes.

Q. So do you have such an opinion or idea?

A. Yes.

Q. And you've had it for some time, have you not?

A. Yes.

Q. And it is a definite opinion, is it not?

A. I guess you'd call it that.

Q. You said I guess?

A. I said I have an opinion, yes.

Q. Yes. Now, is that opinion such that if you were to be a juror in this case, that you would be unable to erase or to put that opinion out of your mind and decide the case only on the evidence that you would hear in Court or would you still remember your opinion as well as evidence you might hear?

Think for a minute and be sure you understand what I just asked you.

A. I don't know how to answer you.

Q. Do you understand the question?

A. Yes sir. I have an opinion but –

Q. Would you require the production of evidence in order to change your opinion?

A. Oh yes, I would.

Q. In other words, you're going to have that opinion and you're going to keep it and you will require something to be done in order for you to change your mind. Is that the idea?

[1181] Q. Well the question is, Mrs. Pyott, you would require the production of evidence in order for you to change your mind – to change your opinion, is that true?

A. Yes.

Q. In other words you cannot take that opinion and put it out of your mind before you hear any evidence. Is that right?

A. No, I couldn't dismiss it from my mind now, no.

Q. Do I understand then, maybe you could dismiss it from your mind later and maybe you couldn't. Is that right.

A. Yes.

Q. When were you notified to be here?

A. Saturday afternoon.

Q. Where were you when you got the notice?

A. At home.

Q. Who was there?

A. My little girl. My one little girl.

Q. Was your husband there?

A. Not at the moment.

Q. When he came in did you discuss the matter with him?

A. I just told him that the Sheriff had been there and I was upstairs changing my clothes before I came down and that I had to come to Clearfield right away.

Q. Did you come in to Clearfield by yourself?

A. Yes.

Q. Did you and he discuss the matter that you were going to come [1182] here on? You knew it was the Yount matter at that time.

A. Yes, because there was somebody from our town that was supposed to come and they didn't. They had a medical excuse.

Q. And you knew about that?

A. I knew they were looking for jurors.

Q. It's sort of been in the newspapers for the last two weeks, has it not, that they were out looking for jurors?

A. Yes, but I just started to work. I haven't been reading it too much the last couple of weeks.

Q. You aren't telling me you haven't read the papers in the last two weeks, are you?

A. No, but not about this.

Q. But you did know the matter was in Court this week and last week?

A. Yes.

Q. And so when the man came and gave you the notice to come to Court you knew it was in connection with this matter?

A. Yes but it was a surprise when he came.

Q. You're just like a lot of people Mrs. Pyott. Everyone is surprised. There's nothing wrong with being surprised. Do you know the name of the person who came and gave you the paper?

A. Yes.

Q. Who was that?

A. Sheriff Charney.

Q. Do you recall what time of the afternoon it was that he showed up there?

[1183] A. Two-thirty or quarter till three.

Q. Did Mr. Charney come back here with you?

A. No, I drove down myself.

Q. You drove yourself?

A. He said he'd bring me if I didn't have a way.

Q. Is he the one that told you he had to go serve a couple other people, particularly, the other person you mentioned a little while ago?

A. Oh no, I just happened to know the other person had a medical excuse. His wife told me.

Q. Who told you?

A. This man's wife told me. This other fellow was supposed to come down last week—he had a medical excuse for medical reasons.

Q. When did you talk to him?

A. I didn't. I said this man's wife told me. I knew that the case was on trial again because I knew that this one man from Burnside was supposed to come down to be selected for jury and he got a medical excuse. That's, I guess that's how I knew that the case was on trial.

Q. That was three or four days ago?

A. Yes, I believe.

Q. Not last Saturday?

A. No.

Q. Would it be any great inconvenience to you or work any hardship on you or your family if you were selected as a juror and had to spend considerable time with us for a while—would there be a hardship?

A. Yes.

[1184] Q. It would be?

A. Yes.

Q. Mrs. Pyott, do I understand your position to be that any evidence you would hear in Court, you would weigh this and measure it against the opinion that you already have in order to arrive at a verdict or decision. Is that correct?

A. Yes I would.

Q. In other words, whatever evidence you would hear in Court you would treat along with your opinion that you have?

A. Yes.

Q. And you could not set aside—you could not set aside or brush aside your opinion before hearing any evidence. Is that right?

A. No.

Q. Do you mean no you could do that or that you can't do that?

A. No, I can't do that.

Q. And the opinion you have would affect your deciding the case only on the evidence, is that right?

A. I don't understand that—

Q. Well, that opinion that you have, you would keep in your mind, and would use that as only one of the things you would consider in deciding the case. In other words, you'd use that as well as the evidence you would hear in Court?

A. Yes.

Q. The answer is "yes"?

A. Yes.

BY MR. KING: Pass the juror.

[1185] BY MR. REILLY:

Commonwealth will accept the juror.

BY MR. KING:

Challenge for cause.

BY THE COURT:

Challenge for cause denied. We are satisfied that this witness has truthfully and accurately answered questions put to her and that she has declared she would decide this case only on the evidence after having heard the evidence and under the cases we are satisfied this is sufficient and, therefore, we direct that she take Alternate Juror's Seat Number 2 and there she will be sworn and seated.

BY THE CLERK:

You do swear by Almighty God, that you will well and truly try and true deliverance make, between the Commonwealth of Pennsylvania versus Jon E. Yount, defendant, and a true verdict give according to the evidence and that as you shall answer to God at the Great Day?

A. I do.

BY THE COURT:

Mrs. Pyott, you have now been seated and sworn as an alternate juror. You are Alternate Juror Number 2, and you will always take that same seat during the trial of this case.

We ask that you not discuss this case with any one nor allow any one to discuss it with you or within your hearing without reporting such an incident to the Court if it should come to your attention. Mrs. Pyott, you will deliver to the Matron a list of personal needs you will be wanted and during the course of trial, if there are others, [1186] you may supply that list. You are not to communicate with anyone. However, your

communications are only with the tipstaves and matrons and the Court. No one else. Therefore, we ask that you not discuss this case even with the tipstaves or matrons because they have no part in the case except to serve your needs and to be security for the jury. They are there to serve you, so anything you need please convey your wishes or desires to them and they will contact the Court. Any written communications, if emergency should require, I want you to know it will be read by both attorneys and by the Court. But those aren't even allowed except as needed by an absolute emergency which would require it anyways. Anything you do write will be read by the attorneys and by the Court. If you will, when you go to the jury room, make out a list and I assume too, you need to have your car driven back home and if you will tell them and give them directions we will see that your car gets back there yet today. And you will have to, of course, give them the keys and notify us where the car is parked. Alright.

This Court is now in recess for ten minutes. The Court will meet with the attorneys in the Lawyer's Room.

Court recessed 3:27 p.m.

Voir dire examinations completed.

IN THE COURT OF OYER AND TERMINER AND
GENERAL JAIL DELIVERY OF CLEARFIELD
COUNTY, PENNSYLVANIA

No. 2 May Sessions, 1966

Commonwealth

VS

Jon E. Yount

MEMORANDUM AND ORDER

The Court having considered all legal arguments together with the testimony produced at hearing upon defendant's motion to suppress evidence and to change venue, has arrived at the conclusion that there is no basis for the contentions of the defendant. The evidence is so clear that there is no such foundation as is claimed by him that the Court does not see any efficacy or need whatsoever for the citation for authority.

First, as to the suppression of evidence, the Court feels that the Supreme Court of Pennsylvania in the Opinion rendered in the instant case to No. 2 May Sessions, 1966, is quite clear and that the guide lines for suppression of evidence have been set forth therein

sufficiently so that the Court will be bound thereby and will be clearly guided.

Second, as to change of venue, the evidence was limited to the fact that without editorial comment of any kinds the newspapers in the County reported the decision of the Supreme Court of Pennsylvania; but it is to be noted that they not only referred to the [dissenting] opinion and quoted it, but also to the majority opinion and quoted it. We do not believe that the mandates of the cases extend so far as to say that the news media cannot publicize, without editorial comment, the decisions of our Courts. It is our belief that this is a necessary and salutary privilege and right of the news media; and that in this instance the reporting did not extend itself beyond that privilege and right. The only other evidence produced to attempt to show a need for change of venue was an occasional telephone call made to the home of the wife of the defendant at which time there would be nobody answering on the end of the line. It is to be noted this occurs quite frequently in various situations and as to many types of people. Therefore, we do not deem this to be sufficient either to grant the prayer of the Petition.

In view of the foregoing the Court enters the following

ORDER

NOW, September 21, 1970 Petition and prayer thereof are dismissed and that it is ORDERED that the proceedings be had forthwith as allowed and required by law and that the defendant be tried upon

Memorandum and Order, Sept. 21, 1970 261a

the charges set forth in the Indictment at the very next Term of Court, namely: October Term 1970.

BY THE COURT,

IN THE COURTS OF OYER AND TERMINER AND
GENERAL JAIL DELIVERY OF CLEARFIELD
COUNTY, PENNSYLVANIA

No. 2 May Sessions, 1966.

Commonwealth

VS

Jon E. Yount

MEMORANDUM & ORDER

Counsel for defendant has again moved for Change of Venue alleging that there has been unfair publicity given to the case, not only before the commencement of the instant matter, but also after trial and after the results of Appeal to the Supreme Court had been announced. Also projected as a reason for which Change of Venue is requested is the fact that voir dire was conducted as to 156 jurors and that 121 of said jurors already have been challenged for cause. After consideration of all matters entering into the selection of jurors in the instant case and after very sober reflection into everything concerned in selection thereof, it is the considered opinion of the Court that the Motion must be denied. The mere fact of numbers in itself is not sufficient to establish a basis for Change

of Venue; nor is the argument presented by defendant that the consumption of 8 days so far in selection of jury indicates prejudice or bias against the defendant one that can be sustained. As argued by the District Attorney, the length of time consumed at this point, with selection only of the 12 jurors in the box, resulted primarily from very extended examinations of prospective jurors by counsel for defendant. The Court adds that it also resulted from the very great leniency of the Court in the permitting questions to the jurors by defendant's counsel. Also entering into the matter of time consumed is the fact that the Court did have to call for additional jurors after exhaustion of the original panel of 102, which itself took up the equal of at least 2 to 3 days. We think in this regard that the observation and explanation given by Judge Laub in his Pennsylvania Trial Guide, Paragraph 34.4, at Page 81, is quite apt in the instant proceeding: "This extraordinary situation (exhaustion of array of the venire) is frequently encountered during the selection of a panel in murder cases. In that type of case the large number of peremptory challenges allowed to each side, *and the liberal allowances of causal challenges* frequently exhausts the array or reduces it to the point where the trial cannot proceed until additional jurors have been summoned". Thus, it is recognized that it is not necessarily the fact that there may be fixed opinions, prejudice, or bias that leads to the challenges granted by a court. This Court would declare that in the interests of justice and the protection of all matters in the proceedings the Court did extend great leniency to defendant in their examination and in the grant of challenges for cause. Furthermore, a Change of Venue should be granted not just for convenience but to

achieve justice and to assure that there will be an impartial jury to try the case. We believe, particularly since we already selected and seated 12 jurors out of a possible 156, that we are achieving the proper results. It is true that since the matter arose the unfortunate death of the youngest sister of Juror #3 occurred and that we had to excuse her from further service by reason thereof; but we do not believe that this changes the situation. If anything, we would believe that the defendant has been benefited when one considers trial tactics. It is to be considered also that fair trial is not precluded in this case; when one recognizes that almost all, if not all, jurors already seated had no prior or present fixed opinion, and this was established by very searching examination and cross-examination by counsel for defendant.

The Court would also note that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there has been little, if any, talk in public concerning the trial from that time to the time when it was announced that a trial date had been fixed. The situation is somewhat like that found in the Case of *Comm. vs Capps* 382 Pa. 72; and we do not believe the jury has been influenced prejudicially against the defendant in anywise, nor will it be. Again, we feel that the situation is one calling for the application of principles contained in the case of *Comm. vs Simmons* 361 Pa. 391. Therefore, recognizing that the trial court has no "inherent power" to change venue; that the Motion for Change of Venue is addressed to the sound discretion of the Court (*Comm vs. Swanson* 432 Pa. 293; *Comm. vs. McGrew* 375 Pa. 518; and *Comm. vs Richardson* 392 Pa. 528, we con-

clude that there is no factual nor legal basis for the grant of the Motion in the instant matter, insofar as jury selection is concerned. Pennsylvania Rules of Criminal Procedure No. 313, which superceded the Act of 1875 PL 30, Section 1, 19 P.S. Section 551, in this regard.

Nor do we find any unfair inferences or prejudicial effects as to or against the defendant resulting in any of the newspaper items which have been the subject of the affidavit filed in this regard on November 13, 1970. With all of the publicity to which they refer, this Court is cognizant that at no time since the commencement of this case on November 4, 1970 have there been any more than 4 spectators in the Court Room, and at most of the times, 2 of these were "Court House hangers on". This is some indication of the fact that particularly in a community as small as ours, there has not been any great effect created by any publicity. In any event, however, the articles are not such as to create any unfairness. Cf. *Comm. vs. Mangan*, 31 D. & C. 2nd 635. Even though this case was decided before the most recent cases dealing with individual rights and the rights of an accused, we are satisfied that the philosophy and practical considerations back of same are equally controlling in the instant case.

Therefore, the Court enters the following

ORDER

NOW, November 14, 1970, Motion to Change Venue is denied.

266a *Memorandum and Order, Nov. 14, 1970*

Further proceedings shall be had according to law. -

BY THE COURT,

IN THE COURT OF OYER AND TERMINER AND
GENERAL JAIL DELIVERY OF CLEARFIELD
COUNTY, PENNSYLVANIA

No. 2 May Sessions 1966

Commonwealth

VS

Jon E. Yount

OPINION

This matter comes before the Court on defendant's motion for new trial, setting forth many and varied bases for the same. The Court will deal with each properly taken matter in order. Since the case has been heard twice, and has been appealed to the Supreme Court (See Commonwealth vs Jon E. Yount 435 Pa. 276, 256 A2d, 464), the Court will not set forth the detailed facts of the occurrence.

For the purposes of the instant matter, it is to be recognized that in the second trial voir dire of the prospective jurors began on November 4, 1970 and continued until November 16, 1970, when the jury was empanelled. As pointed out by counsel for defendant one jury panel was entirely exhausted, another was

challenged by defendant and dismissed, and on five occasions the Court did summon additional groups of prospective jurors. Trial commenced on November 17, 1970 and on November 20, 1970 resulted in a verdict of guilty of murder in the first degree.

The first issue raised by defendant is that the Court erred in refusing to change the venue. We are satisfied that the action of the Court was entirely correct. The first of the trials occurred in 1966, and as pointed out herein, the second one occurred in 1970. As the record will indicate there was practically no publicity given to this matter through the news media in the meanwhile except to report that a new trial had been granted by the Supreme Court. It is to be noted also that throughout the second trial there was practically no public interest shown in the trial; one thing to be noted is that on some days there being practically no persons present even to listen to it. The mere fact that it took such a long time to select a jury was simply that defendant raised so many questions and the Court exercised its discretion to assure that there could be no complaint about the final jury empanelled. Certainly because it takes a lengthy time to select a jury is not a sufficient basis for declaring that there is any prejudice or bias whatever involved. In fact, as already indicated this Court perceived of no bias or prejudice resulting in any manner. We are satisfied that the Court properly exercised its discretion to grant a new trial, and therefore, do not sustain defendant's position in this regard. Cf. *Commonwealth vs Swanson* 432 Pa. 293, 248 A2d 12 and cases cited therein. We conclude that the Court satisfied all requirements of Pennsylvania Rules of Criminal Procedure, particularly, Rule 313.

Defendant asserts that the Court erred in its rulings on challenges for cause made for defendant during voir dire. Again, we are satisfied that even where a juror may have had any opinion in the matter, the jury was without prejudice and was able to and did arrive at its verdict on the testimony and the law involved. A review of all of the matters attacked by defendant, considering the whole of the examination put to the various jurors by the Commonwealth and by defendant establishes without question that these rulings were accurate. Furthermore, we do not acknowledge to, in fact deny, the allegation that the Court would grant a change of venue if a particular group of jurors was exhausted. The Court would still retain to itself the right to declare whether a juror could or could not be selected under the circumstances; and it definitely was satisfied that this was a case where a jury could be, and was, so selected. Cf. Commonwealth vs Swanson 432 Pa. 293, 248 A2d 12.

The defendant next attacks the refusal of the Court to sequester Commonwealth witnesses. As pointed out by the Commonwealth no witness was called who had not previously testified at the first trial; and examination of all of the testimony will indicate that it was much as was given at the first trial of this case. There was no reason for the Court, then, to sequester. See Commonwealth vs. Kravitz, 400 Pa. 198 at 217, where the Court declared:

"Defendant contends that the trial Court erred in refusing to separate and sequester the police officers and detectives who were Commonwealth's witnesses. In nearly every criminal and civil case, one side or the other would like to have some or

all of the witnesses of his opponent sequestered. The lack of adequate room space, the long delays which would inevitably be caused by sequestration and other practical considerations, make sequestration of witnesses ordinarily impractical or inadvisable, except in unusual circumstances.* (*A request for sequestration of a witness or witnesses should be specific and should be supported by some reason or reasons demonstrating that the interests of justice require it.) For the foregoing reasons the question of sequestration of witnesses is left largely to the discretion of the trial Judge and his decision thereon will be reversed only for a clear abuse of discretion."

The next allegation of defendant is that the Court erred in refusing to suppress the evidence with regard to the defendant's stationwagon. Again, this position is not well taken. Defendant presented himself at the State Police Substation on the morning after the homicide, and thereafter the Police obtained search warrant for the stationwagon and took it into their custody and possession. Defendant's allegation is that this was an unreasonable and illegal search and seizure because: (1) not incident to a lawful arrest; (2) based on information obtained after Miranda warnings should have been given, and therefore, were "fruits of the poisonous tree"; and, (3) that there was no probable cause for issuance of the search warrant beyond that contained in defendant's confession which was later held to be inadmissible. They failed to recognize, however, that there was probable cause for the issuance of the search warrant and that that did not emanate from confession made by defendant. Two of

the witnesses testified to seeing the particular type of stationwagon, giving its name, color, and make. These were at or near the site of the crime and at or near the time thereof. As the record will note on the very following morning that the defendant appeared at the Police Substation he declared that he had been the one that they were looking for in the killing of the victim. No Miranda requirements existed at that point. These were sufficient bases for probable cause, and as declared in *Spinelli vs U.S.*, 393 U.S. 410, 89 S. Ct. 584:

"... In holding as we have done, we do not retreat from the established propositions that only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause, *Beck v. Ohio*, 379 U.S. 89, 96, 13 L.Ed. 2d 142, 147, 85 S. Ct. 223 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois*, 386 U.S. 300, 311, 18 L.Ed. 2d 62, 70, 87 S. Ct. 1056 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States v. Ventresca*, 380 U.S. 102, 108, 13 L.Ed. 2d 284, 688, 85 S. Ct. 741 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States*, 362 U.S. 257, 270-271, 4 L.Ed. 2d 697, 707, 708, 80 S.Ct. 725, 78 ALR 2d 233 (1960)."

The next complaint of the defendant is to the effect that the Court erred in refusing to suppress all

alleged oral admissions made to the Police by the defendant, after defendant indicated that he was the man the Police were seeking in connection with the Luthersburg incident. It is to be noted that this defendant presented himself to the Police on the morning after the homicide, without direction, order, or mandate. In fact, when he did so there was no knowledge on the part of the Police that he "was the one they were looking for". When the Officer without further identification asked defendant why the Police were seeking him, he answered, "because I killed that girl". At no time until then was he in Police custody nor had they "pointed the finger at him". Therefore, the cases relied upon by defendant are not at all controlling in the instant matter. In those, the defendant was unquestionably under police control and custody. We are satisfied further that Mr. Justice Roberts very definitely recognized that this portion was properly admitted and formed the basis for the action of the Police in this regard when he declared:

"At this point, appellant was invited to sit down and was given something to eat. One of the officers then began questioning appellant, asking him, 'How did you kill that girl?' According to the officer, appellant replied 'I struck her with a wrench and I choked her.' The officer here gave appellant warnings which Commonwealth concedes did not include appellant's right to free counsel if he could not afford his own attorney. The conference recommenced and appellant gave his first confession."

We are satisfied that in our interpretation of Mr. Justice Roberts' Opinion the Court did not intend that

what occurred prior to the interrogation thereafter instituted could not be a basis for disregarding the spontaneous and volunteered statements made when the defendant came to the Police Substation. See also *Commonwealth vs Freeman* 438 Pa. 1, 263 A2d 403; and, *Commonwealth vs Frye*, 433 Pa. 473, 252 A2d 580.

The sixth basis advanced by defendant is that the Court erred in admitting into evidence a pocketknife which was taken along with other incriminating evidence as a result of the search warrant. We are satisfied that in no manner was there any harm to the defendant in this regard; and in any event, in view of the fact that the pathologist declared that the victim's throat had been cut by a sharp instrument, that the pocketknife was in his possession when he admitted to the crime, only one-half day later, satisfied the Court that this was properly admitted. See *Commonwealth vs. Settles* 442 Pa. 159, A.2d . The knife admitted in that case had no possible bearing because the victim was shot and there was no evidence of the use of any other instrument.

Certain photographs of the deceased as well as articles of her clothing worn by her at the time of the homicide were admitted into evidence, and counsel now attacks the same on the basis that this was inflammatory. We do not feel that the photographs were at all inflammatory, and particularly are satisfied that they did not so result because the Court gave very strict instructions in regard to their use. Under all the cases and because the testimony in this regard would have been deficient if such had not been admitted in order to be compared with the descriptions given by

oral testimony, we overrule defendant's allegations in this regard. The photographs aided in the jury's understanding of the type of injuries inflicted, where and how the deceased was found, the site and position of the deceased, and in very definite corroboration of the oral testimony of witnesses. Cf. *Commonwealth vs. Chasten* 443 Pa. 29, A.2d . It is to be noted also that the jury saw these photographs only briefly and the jury was not given the photographs nor the clothing to consider upon their retirement to the jury room.

Defendant next declares that the Court erred in refusing the defendant's Points for Charge, particularly those pertaining to the Commonwealth's failure to produce sufficient evidence of a willful, deliberate, and premeditated homicide, and failure to prove any deadly weapon in connection with the homicide. Again, we feel that this is not well taken. The principal Charge of the Court as well as the Points for Charge which were related to the jury fully covered all matters in this regard. A reading of the testimony will very definitely reveal that the Commonwealth did fully establish a willful, deliberate, and premeditated homicide and that this was accomplished with a deadly weapon. Cf. *Commonwealth vs. Myers* 439 Pa. 381, 266 A2d 756 and *Commonwealth vs Pavkovich* 444 Pa. 530, 283 A2d 295.

Defendant next attacks the Court's instructions to the jury alleging that it placed undue emphasis on the law governing murder in the first degree and failing to adequately cover second degree murder; and, further, declaring that the Court over-emphasized its opinion that the circumstances could not warrant a verdict of

voluntary manslaughter. It is to be noted first that no objection to the Charge in this respect was made by counsel except with reference to the possible verdict of voluntary manslaughter. Read as a whole, we are satisfied that the Court's Charge fully and adequately left with the jury the determination of all matters upon which any verdict, and particularly, of murder in the first degree, could be based. We are of the opinion that the Court's Charge was eminently fair and did not take any matter from the jury in any respect. The defendant's further objection to the fact that the Court declared to the jury that if it found a verdict of guilty in the first degree, it could not impose the death penalty. We do not believe that the defendant was harmed in any way, and further that the jury was entitled to this instruction. Insofar as the Court's reference to the possible verdict of voluntary manslaughter is concerned, a reading of the Court's statements in this regard definitely indicates that the jury had to understand that it was not a binding direction, but that they could return such a verdict if they felt that it was indicated. This is particularly true when it is felt that the whole of the Charge fairly presented all matters to the jury.

Defendant next alleges that the District Attorney made inflammatory and prejudicial remarks in his closing address, and that the District Attorney made unwarranted speculation to the jury as to how the homicide occurred, none of which it is alleged was based on any fact; and that therefore, the Court erred in failing to grant defendant's motion for mistrial. Some of the assertions made by defendant in its Brief are not sustained by the record; and those which are

276a *Opinion, County Court, Jan. 15, 1973*
Order

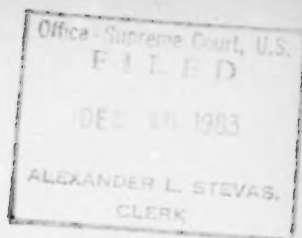
sustained, are not sufficient at all to call for the mistrial. We are satisfied that in our recollection nothing inflammatory was declared by counsel for the Commonwealth and certainly his remarks were not prejudicial to the defendant but comported with proper presentation of arguments to the jury seeking its favorable verdict. Therefore, we also reject this avenue of attack upon the verdict.

Lastly, the defendant attacks the verdict on the basis that it was contrary to the evidence produced at trial and also contrary to the law. All that need to be declared in regard to this assertion is that a reading of the testimony clearly divulges more than sufficient proof to establish the guilt of the defendant and that certainly the law applicable thereto sustains the following

ORDER

NOW, January 15, 1973, motion for new trial is dismissed and it is ORDERED that the defendant be presented when called for the purpose of Sentencing.

BY THE COURT,



VOLUME II—Pages 277a-644a

No. 83-95

In the Supreme Court of the United States

October Term, 1983

ERNEST S. PATTON, Superintendent, SCI—CAMP HILL,
and HARVEY BARTLE, III, Attorney General of the Com-
monwealth of Pennsylvania,

Petitioners,

v.

JON E. YOUNT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

JOINT APPENDIX

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Petition for Certiorari Filed June 29, 1983.
Certiorari Granted October 17, 1983.

TABLE OF CONTENTS

PAGE

VOLUME I:

Docket Entries — United States District Court for the Middle District of Pennsylvania	1a
Docket Entries — United States District Court for the Western District of Pennsylvania	3a
Docket Entries — United States Court of Appeals for the Third Circuit	12a

PROCEEDINGS IN THE COURTS OF PENNSYLVANIA:

Transcript of Hearing:

Vera K. Krapf:

Voir Dire Examination	18a
---------------------------------	-----

Blair Hoover:

Voir Dire Examination	29a
---------------------------------	-----

Clair Clapsaddle:

Voir Dire Examination	40a
---------------------------------	-----

John Yorke:

Voir Dire Examination	53a
---------------------------------	-----

Mary Jane Waple:

Voir Dire Examination	66a
---------------------------------	-----

James F. Hrin:

Voir Dire Examination	80a
---------------------------------	-----

Martin R. Karetski:

Voir Dire Examination	96a
---------------------------------	-----

Julia C. Hummel:

Voir Dire Examination	116a
---------------------------------	------

Omar H. Ives:	
Voir Dire Examination	136a
Mrs. Jessie M. Parks:	
Voir Dire Examination	146a
Albert I. Undercoffer:	
Voir Dire Examination	160a
Robert P. Murphy:	
Voir Dire Examination	173a
Irene Kurtz:	
Voir Dire Examination	189a
John T. Harchak:	
Voir Dire Examination	206a
David J. Chincharick:	
Voir Dire Examination	229a
LaVerne B. Pyott:	
Voir Dire Examination	245a
Memorandum and Order, Sept. 21, 1970	259a
Memorandum and Order, Nov. 14, 1970	262a
Opinion, County Court, Jan. 15, 1973	267a
Order	276a
VOLUME II:	
Opinion, Supreme Court of Pennsylvania, Jan. 24, 1974	277a
PROCEEDINGS IN THE FEDERAL COURTS:	
Motion To Proceed in Forma Pauperis	295a
Affidavit of Poverty	296a
Petition for Writ of Habeas Corpus	297a
Answer to Petition for Writ of Habeas Corpus..	310a
Petitioner's Traverse to Respondents' Answer to Petition for Writ of Habeas Corpus	336a

Order, April 16, 1981	349a
Amendment to Petition for Writ of Habeas Corpus	350a
Answer to Amendment to Petition for Writ of Habeas Corpus	359a
Petition To Dismiss Petition for Writ of Habeas Corpus	393a
Transcript, Hearing, November 3, 1981, United States District Court, on Petition for Writ of Habeas Corpus:	395a
Petitioner's Evidence:	
Homer W. King, Esq.:	
Direct Examination	401a
Cross-Examination	434a
Redirect Examination	449a
Recross-Examination	452a
Caroline Yount:	
Direct Examination	454a
Cross-Examination	464a
Redirect Examination	469a
Constance Ives:	
Direct Examination	472a
Cross-Examination	475a
James V. Wade:	
Direct Examination	477a
Jon E. Yount:	
Direct Examination	482a
Cross-Examination	513a
Redirect Examination	514a

Petitioner's Exhibits:

P-1-a—Newspaper Article, April 29, 1966 . .	520a
P-1-b—Newspaper Article, April 30, 1966 . .	529a
P-1-d—Newspaper Article, May 3, 1966 . . .	533a
P-1-f—Newspaper Article, September 19, 1966	542a
P-1-g—Newspaper Article, September 26, 1966	544a
P-1-h—Newspaper Article, September 27, 1966	552a
P-1-i—Newspaper Article, September 28, 1966	557a
P-1-j—Newspaper Article, September 29, 1966	565a
P-1-k—Newspaper Article, September 30, 1966	574a
P-1-l—Newspaper Article, October 1, 1966 .	583a
P-1-m—Newspaper Article, October 3, 1966	591a
P-1-n—Newspaper Article, October 4, 1966	598a
P-1-o—Newspaper Article, October 5, 1966	607a
P-1-p—Newspaper Article, October 6, 1966	617a
P-1-q—Newspaper Article, October 7, 1966	623a
P-1-r—Newspaper Article, October 8, 1966	631a
P-1-s—Newspaper Article, October 10, 1966	639a
P-1-t—Newspaper Article, October 11, 1966	640a
P-1-v—Newspaper Article, June 30, 1969 . .	642a
P-1-w—Newspaper Article, July 1, 1969 . . .	643a
P-1-x—Newspaper Article, July 5, 1969 . . .	644a

VOLUME III:

P-1-y—Newspaper Article, July 10, 1969 . . .	645a
P-1-z—Newspaper Article, Sept. 8, 1969 . . .	646a
P-1-aa—Newspaper Article, Oct. 27, 1969 .	648a
P-1-bb—Newspaper Article, Dec. 6, 1969 . .	649a
P-1-cc—Newspaper Article, Feb. 25, 1970 .	650a
P-1-dd—Newspaper Article, March 9, 1970	651a
P-1-ee—Newspaper Article, May 7, 1970 . . .	652a
P-1-ff—Newspaper Article, May 15, 1970 . .	653a
P-1-gg—Newspaper Article, Sept. 22, 1970 .	654a
P-1-hh—Newspaper Article, Sept. 30, 1970 .	655a
P-1-ii—Newspaper Article, Oct. 7, 1970 . . .	655a
P-1-jj—Newspaper Article, Oct. 27, 1970 . .	656a
P-1-kk—Newspaper Article, Nov. 3, 1970 . .	657a
P-1-ll—Newspaper Article, Nov. 4, 1970 . . .	658a
P-1-mm—Newspaper Article, Nov. 5, 1970 .	658a
P-1-nn—Newspaper Article, Nov. 6, 1970 . .	661a
P-1-oo—Newspaper Article, Nov., 1970	662a
P-1-pp—Newspaper Article, Nov., 1970 . . .	663a
P-1-qq—Newspaper Article, Nov. 10, 1970 .	664a
P-1-rr—Newspaper Article, Nov. 12, 1970 .	666a
P-1-ss—Newspaper Article, Nov. 13, 1970 . .	667a
P-1-tt—Newspaper Article, Nov. 14, 1970 . .	667a
P-1-uu—Newspaper Article, Nov. 16, 1970 .	669a
P-1-vv—Newspaper Article, Nov. 17, 1970 .	670a
P-1-ww—Newspaper Article, Nov. 18, 1970	672a
P-1-xx—Newspaper Article, Nov. 19, 1970 .	673a
P-1-yy—Newspaper Article, Nov. 20, 1970 .	674a
P-1-zz—Newspaper Article, Nov., 1970	677a

P-1-aaa—Newspaper Article, Nov. 23, 1970	678a
P-1-bbb—Newspaper Article, Dec. 1, 1970	679a
P-1-ccc—Newspaper Article, Oct. 6, 1981	681a
P-1-ddd—Newspaper Article, Oct. 10, 1981	682a
P-1-eee—Newspaper Article	683a
P-1-fff—Newspaper Article	685a
P-1-ggg—Newspaper Article	685a
Plaintiff's Exhibit No. 5—Newspaper Article, Oct. 6 and 10, 1981	687a
Transcript, Hearing, December 28, 1981, United District Court, Before Robert Mitchell, United States Magistrate:	689a
Respondent's Evidence:	
Hon. John A. Cherry:	
Direct Examination	690a
Cross-Examination	700a
Redirect Examination	710a
Recross-Examination	710a
Hon. John K. Reilly, Jr.:	
Direct Examination	712a
Cross-Examination	719a
Francis V. Sebino, Esq.:	
Direct Examination	722a
Cross-Examination	734a
Redirect Examination	738a
Recross-Examination	739a
Magistrate's Report and Recommendation	744a
Order, February 12, 1982	769a
Respondent's Objections to Magistrate's Report and Recommendation	770a

Amendment to Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus	778a
Order, March 31, 1983	781a
Opinion, United States District Court, April 22, 1982	783a
Order, United States District Court, April 22, 1982	809a
Order, April 23, 1982	810a
Motion To Supplement the Record	811a
Order, May 21, 1982	828a
Answer to Motion To Supplement the Record ..	829a
Order, June 21, 1982	831a
Notice of Appeal	832a
Opinion, United States Court of Appeals for the Third Circuit	833a
Judgment, United States Court of Appeals for the Third Circuit	892a
Petition for Writ of Certiorari	894a
Respondent's Brief in Opposition	906a
Order Allowing Certiorari	917a

COMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

JON E. YOUNT, Appellant.

SUPREME COURT OF PENNSYLVANIA

Jan. 24, 1974.

[455 Pa. 303, 314 A.2d 242]

Before JONES, C. J. and EAGEN, O'BRIEN, ROBERTS,
POMEROY and MANDERINO, JJ.

OPINION OF THE COURT

ROBERTS, Justice.

In October of 1966, a jury found appellant guilty of the crimes of murder in the first degree and rape. A sentence of life imprisonment was imposed. On appeal, this Court reversed the judgment of sentence and granted a new trial because appellant's rights, as mandated by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed 2d 694 (1966), were violated. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969) cert. denied, 397 U.S. 925, 90 S.Ct. 918, 25 L.Ed. 2d 104 (1970).

On retrial in November, 1970, a jury again found appellant guilty of murder in the first degree,¹ and the penalty was again fixed at life imprisonment. Post-trial motions were denied and this direct appeal followed.² We now affirm.

On April 28, 1966, the body of Pamela Sue Rimer, an eighteen year-old high school student, was discovered in a wooded area near her home in Luthersburg, Pennsylvania. One of her stockings was knotted and tied around her neck. An autopsy revealed that death was caused by strangulation. Further examination disclosed three slashes across the victim's throat and cuts of the fingers of her left hand inflicted by a sharp instrument, and numerous wounds about her head, caused by a blunt instrument.

At approximately 5:45 a.m. on the morning of April 29, 1966, appellant, a teacher at the school the deceased had attended, voluntarily appeared at the state police substation in DuBois, Pennsylvania, and rang the doorbell. An officer opened the door and asked whether he could be of assistance. Appellant stated, "I am the man you are looking for." The officer asked whether he was referring to the "incident in Luthersburg," and appellant responded in the affirmative.

The officer then asked appellant to come into the police station and be seated. Leaving appellant unattended, the officer proceeded to a back bedroom where a detective and another police officer were sleeping, woke

¹ Appellant's motion to quash the indictment for rape was granted, and the second trial was for the crime of murder alone.

² Jurisdiction attaches by virtue of the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, art. II, §202(1), 17 P.S. §211.202(1) (Supp. 1973).

them, and informed them that "there was a man in the front that said we are looking for him." He then returned to the front office where appellant, who had removed his coat, hat, and gloves, identified himself as Jon Yount.

After dressing, the detective and the second officer entered the front office. The detective was told by the first officer that appellant's name was Jon Yount. The detective then asked appellant to be seated inside a smaller office adjacent to the front office, where he asked, "Why are we looking for you?" Appellant replied, "I killed that girl." Upon hearing that answer, the detective inquired, "What girl?", and appellant responded, "Pamela Rimer."

In response to the detective's next question, "How did you kill this girl?", appellant answered, "I hit her with a wrench and I choked her." At that point the detective gave appellant admittedly inadequate *Miranda* warnings, and began interrogation as to the details of the crime. A written confession was subsequently obtained.

Prior to appellant's second trial, the question "How did you kill this girl?" and its answer, as well as the written confession were suppressed, on the authority of our prior decision, *Commonwealth v. Yount*, supra, as violative of *Miranda*. The admissibility of appellant's initial statements that the police were looking for him in connection with the Luthersburg incident is not challenged, nor could a challenge be successful. See *Commonwealth v. Miller*, 448 Pa. 114, 121 n.2, 290 A.2d 62, 65 n.2 (1972).

Appellant does contend, however, that the court erred in not suppressing his statement, "I killed that girl," and his identification of the victim as "Pamela Rimer."

It is argued that these two admissions were the product of "custodial interrogation" and therefore should have been preceded by *Miranda* warnings. Appellant argues that warnings were required *before* the question "Why are we looking for you?" was asked.³ We are asked to determine the precise time when the need for *Miranda* warnings arose. It is now beyond question that "'whenever an individual is questioned while in custody or while the object of an investigation of which he is the focus, before any questioning begins the individual must be given the warnings established in *Miranda*. . . .'" *Commonwealth v. D'Nicuola*, 448 Pa. 54, 57, 292 A.2d 333, 335 (1972) (quoting *Commonwealth v. Feldman*, 432 Pa. 428, 432, 248 A.2d 1, 3 (1968)). Accord, *Commonwealth v. Simala*, 434 Pa. 219, 225, 252 A.2d 575, 578 (1969); see *Commonwealth v. Hamilton*, 445 Pa. 292, 285 A.2d 172 (1971).

It is, however, only that questioning which is interrogation initiated by law enforcement officers which calls for *Miranda* warnings. *Miranda v. Arizona*, supra at 444, 86 S.Ct. at 1612, 16 L.Ed. 2d 694. As this Court held in *Commonwealth v. Simala*, supra at 226, 252 A.2d at 578: "'[I]t is not simply custody plus 'questioning,' as such, which calls for the *Miranda* safeguards but custody plus police conduct . . . calculated to, expected to, or likely to, evoke admissions.'" The rationale behind this holding is found in *Miranda*, where the Court stated: "Confessions remain a proper element in law enforcement. . . .

³ In our prior decision, a new trial was granted because the written confession admitted into evidence was not preceded by warnings satisfying *Miranda*. The question of the admissibility of the two statements here challenged, not being necessary to our earlier decision, was not there decided.

The fundamental import of the privilege . . . is not whether [an individual] is allowed to talk to the police without the benefit of warnings and counsel, *but whether he can be interrogated*. There is no requirement that the police stop a person who enters a police station and states that he wishes to confess to a crime. . . . Volunteered statements of any kind are not barred by the Fifth Amendment. . . ." *Miranda v. Arizona*, supra at 478, 86 S.Ct. at 1630 (emphasis added).

Clearly, "any question likely to or expected to elicit a confession constitutes 'interrogation' under *Miranda*. . . ." *Commonwealth v. Simala*, supra, at 227, 252 A.2d at 579. Accord, *Commonwealth v. Mercier*, 451 Pa. 211, 214, 302 A.2d 337, 339 (1973). But "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence" *Miranda v. Arizona*, supra at 478, 86 S.Ct. at 1630, 16 L.Ed. 2d 694.

On this record it cannot be said that the two police inquiries here challenged constitute conduct calculated to, expected to, or likely to elicit an incriminating response, or that they were asked with an intent to extract or an expectation of eliciting an incriminating statement. All this record establishes is that the detective knew only that a man named Jon Yount—a name which the detective had never heard before—voluntarily came to the police station early in the morning and volunteered that the police were looking for him. In response to this information, the detective extemporaneously asked, "Why are we looking for you?" Appellant was not coerced, prompted, or urged to incriminate himself. To the contrary, the detective's inquiry, made in response to information volunteered by appellant, was of a neutral character and not interrogative.

Appellant's answer, "I killed that girl," was given freely and without compelling influence. It was therefore volunteered in the constitutional sense. That the answer was in fact incriminating does not alter its volunteered character nor preclude its use. *Miranda v. Arizona*, supra at 478, 86 S.Ct. at 1630, 16 L.Ed. 2d 694.

Similarly, we are of the opinion that the statement identifying "that girl" as "Pamela Rimer" was volunteered. Appellant, without any compulsion, went to the substation and volunteered that he had killed "that girl." As we indicated in *Commonwealth v. Simala*, supra at 226 n.2, 252 A.2d at 579 n.2, after an incriminating, but ambiguous, statement is volunteered, as was done here, a question which does not do "anything more than clarify statements already made," in the absence of any coercion or prompting, subtle or overt, is permissible. See also Kamisar, " 'Custodial Interrogation' Within the Meaning of *Miranda*," in Institute of Continuing Legal Education, Criminal Law and the Constitution—Sources and Commentaries 335, 354 (1968).

Here, immediately upon hearing appellant's volunteered statement, "I killed that girl," the detective spontaneously asked, "What girl?" By this he sought only to clarify appellant's prior statement. Appellant responded, "Pamela Rimer." Such a clarifying inquiry, made in response to a statement volunteered by appellant during an interview which he initiated, is proper. The identification must be deemed constitutionally volunteered. Accord, *State v. Perry*, 14 Ohio St.2d 256, 237 N.E.2d 891 (1968); *People v. Mercer*, 257 Cal.App.2d 244, 64 Cal. Rptr. 861 (1967); see *Hicks v. United States*, 127 U.S. App. D.C. 209, 382 F.2d 158 (1967).

As already indicated, appellant volunteered both that he had killed someone and the victim's identity. Because "[v]olunteered statements . . . are not barred by the Fifth Amendment," *Miranda v. Arizona*, supra at 478, 86 S.Ct. at 1630, their use as evidence was constitutionally permissible.

However, after these statements were given, *Miranda* warnings became necessary. *Commonwealth v. Yount*, supra at 280, 256 A.2d at 466; see *Commonwealth v. Feldman*, 432 Pa. 428, 248 A.2d 1 (1968); *Commonwealth v. Jefferson*, 423 Pa. 541, 226 A.2d 765 (1967). Appellant's initial admission and identification created the critical moment after which interrogation without *Miranda* warnings was impermissible. It was the absence of warnings at that moment, and not before, that required our prior reversal. The earlier, volunteered statements, however, were not the product of interrogation initiated by the police.⁴

On this record, therefore, it must be concluded that the Commonwealth satisfied its burden of proving by a preponderance of the credible evidence that the two statements here challenged were constitutionally permissible evidence. *Commonwealth v. Ravenell*, 448 Pa. 162, 292 A.2d 365 (1972); Pa.R.Crim.P. 323(h), 19 P.S. Appendix.

Appellant raises ten additional assignments of error. These need be discussed only briefly.

⁴ In light of our determination that appellant's statements were volunteered, we need not determine, as the Commonwealth argues, whether appellant was then in "custody." See *Commonwealth v. Marabel*, 445 Pa. 435, 283 A.2d 285 (1971).

Appellant contends that the trial court erred in refusing his timely motions for a change of venue, and advances three arguments in support of this position. First, it is asserted that excessive pretrial publicity prevented a fair trial. In responding to this argument, the trial court observed: "The first of the trials occurred in 1966, and as pointed out herein, the second one occurred in 1970. As the record will indicate there was practically no publicity given to this matter through the news media in the meanwhile except to report that a new trial had been granted by the Supreme Court. It is to be noted also that throughout the second trial there was practically no public interest shown in the trial; one thing to be noted is that on some days there being practically no persons present even to listen to it. . . ." These findings, fully supported by the record, do not sustain appellant's claim, and the court properly denied appellant's motion for a change of venue predicated on this theory. *Commonwealth v. Pierce*, 451 Pa. 190, 303 A.2d 209, cert. denied, 414 U.S. 878, 94 S.Ct. 164, 38 L.Ed. 2d 124 (1973); *Commonwealth v. Johnson*, 440 Pa. 342, 269 A.2d 752 (1970).

Second, appellant contends that the excusing of a large number of veniremen for cause, and the nature of the answers of those so excused, conclusively demonstrated substantial community bias and prejudice which required a change of venue. Nothing in this record, however, refutes the court's assertion that it liberally granted appellant's challenges for cause "to assure that there could be no complaint about the final jury empanelled." Neither does the voir dire, as appellant argues, reveal a "clear and convincing" build-up of prejudice or a "'pattern of deep and bitter prejudice' shown . . . throughout the com-

munity" which would require a change of venue. *Irvin v. Dowd*, 366 U.S. 717, 725, 727, 81 S.Ct. 1639, 1644, 1645, 6 L.Ed. 2d 751 (1961). See *Commonwealth v. Hoss*, 445 Pa. 98, 103-07, 283 A.2d 58, 61-63 (1971); *Commonwealth v. Swanson*, 432 Pa. 293, 248 A.2d 12 (1968), cert. denied, 394 U.S. 949, 89 S.Ct. 1287, 22 L.Ed. 2d 483 (1969).

Third, it is argued that the Act of March 18, 1875, P.L. 30, §1, 19 P.S. §551 (1964), mandated a change of venue. This Act states, inter alia:

"In criminal prosecutions the venue may be changed, on application of the defendant . . .

.

. . . When, upon second trial of any felonious homicide, the evidence on the former trial thereof shall have been published within the county in which the same is being tried, and the regular panel of jurors shall be exhausted without obtaining a jury."

The Act, however, by its own terms, is directed to the sound discretion of the trial court. As this Court established in *Commonwealth v. Karmendi*, 328 Pa. 321, 337-338, 195 A. 62, 69 (1937): "The act is not madatory; it lies within the sound discretion of the court below: *Com. v. Cleary*, 148 Pa. 26, 23 A. 1110, but in a particularly notorious case in a given community, this court will review that discretion, and if in its judgment it is felt the accused could not help but be prejudiced in her subsequent trial by the feeling engendered, a new trial will be granted. . . ." See also *Commonwealth v. Sacarakis*, 196 Pa. Super. Ct. 455, 175 A.2d 127 (1961). Although the

regular panel of jurors was in fact exhausted before the jury was selected,⁵ this circumstances alone obviously does not require a change of venue. It cannot be said that the court abused its discretion where, as here, the record fails to disclose undue community prejudice.

Similarly, we reject appellant's argument that, during voir dire, the court erred in denying certain challenges for cause. Our reading of the testimony of the challenged jurors satisfies us that the trial court correctly concluded that "even where a juror may have had any opinion in the matter, the jury was without prejudice and was able to and did arrive at its verdict on the testimony and the law involved." The record shows that none of the jurors had a fixed opinion as to appellant's guilt or innocence, or was otherwise legally unable to serve. See *Commonwealth v. Hoss*, supra at 107, 283 A.2d at 63-64; *Commonwealth v. Swanson*, supra at 299, 248 A.2d at 15; *Commonwealth v. McGrew*, 375 Pa. 518, 525, 100 A.2d 467, 470 (1953).⁶

⁵ Indeed, the exhaustion of the initial array is not an unusual occurrence. As Dean Laub observed: "It sometimes happens that there are so many disqualified or excused jurors that the array is not large enough to permit the completion of a particular civil or criminal panel. This extraordinary situation is frequently encountered during the selection of a panel in murder cases. In that type of case the large number of peremptory challenges allowed to each side, and the liberal allowance of causal challenges frequently exhausts the array or reduces it to the point where the trial cannot proceed until additional jurors have been summoned." 1 B. Laub, *Pennsylvania Trial Guide* §34.4 at 81 (1959).

⁶ See also ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Trial by Jury* §2.5 (Approved Draft, 1968). The Commentary to that section suggests:

Appellant also argues that all evidence seized during a search of his automobile should have been suppressed. He asserts that the search warrant relied upon by the police was issued without probable cause.

Before the time appellant appeared at the DuBois substation, another state policeman, working entirely separately and in a location different from the station to which appellant went, received from two witnesses a description of an automobile they had seen near where the victim's body was found. The witnesses reported that, at about the time the murder was committed, the automobile passed their home headed toward the scene, and that later it passed from the opposite direction traveling at high speed. That policeman, working only from this information, learned that one Jon Yount owned an automobile fitting the description.

After appellant admitted that he had killed Pamela Rimer, one of the officers at the substation reported that fact to the main police barracks. This collective knowl-

"A challenge for cause to an individual juror may be made only on the ground:

.

(j) That the juror has a state of mind in reference to the cause or to the defendant or to the person alleged to have been injured by the offense charged, or to the person on whose complaint the prosecution was instituted, which will prevent him from acting with impartiality; but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the evidence." *Id.* 68-69.

edge, properly before the magistrate,⁷ constituted the requisite probable cause for the issuance of the search warrant. See *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *Commonwealth v. Hall*, 451 Pa. 201, 302 A.2d 342 (1973); *Commonwealth v. D'Angelo*, 437 Pa. 331, 263 A.2d 441 (1970). Since appellant's admission was not tainted we agree with the trial court that the subsequent search was not impermissible as the "fruit of a poisonous tree." *Commonwealth v. Marabel*, 445 Pa. 435, 444, 283 A.2d 285, 289 (1971); see *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963).

Appellant contends that a pocketknife found on his person when he was arrested was improperly admitted into evidence. As previously noted, the victim suffered cuts of the neck and fingers, and appellant was arrested about twelve hours after the commission of the crime. The knife was of a kind that could have inflicted the wounds, even though the prosecution was unable conclusively to demonstrate that the particular knife was the weapon used. Its relevance cannot be successfully challenged. "The fact that the accused had a weapon or implement suitable to the commission of the crime charged, such as a knife . . . is always a proper ingredient of the case for the prosecution." 1 Wharton's Criminal Evidence §157 at 289-90 (13th ed. C. Torcia 1972).

⁷ For purposes of establishing probable cause, the officer who obtained the warrant was entitled to rely on the information communicated to him from the DuBois substation. *United States v. Stratton*, 453 F.2d 36, 37-38 (8th Cir.), cert. denied, 405 U.S. 1069, 92 S.Ct. 1515, 31 L.Ed. 2d 800 (1972).

This relevant evidence clearly was admissible. As this Court recently held in *Commonwealth v. Ford*, 451 Pa. 81, 84, 301 A.2d 856, 857 (1973): "[P]ositive testimony that the knife in question was actually the murder weapon is not required prior to introduction into evidence. . . . If a proper foundation for admission of the evidence has been laid, as here, then admission into evidence is permissible. . . . The fact that the knife could not be positively identified affects the weight of such evidence, but not its admissibility. . . ."⁸

Here, not only was the knife a possible murder implement, but it was found upon the person of the appellant at a time "reasonably proximate to the commission of the crime." 1 Wharton's Criminal Evidence §211 at 442 (13th ed. C. Torcia 1972). A foundation sufficient to support the admission of the knife was laid. Its evi-

⁸ See also 1 Wharton's Criminal Evidence §211 at 441-42 (13th ed. C. Torcia 1972) (footnotes omitted):

"It is relevant to show that the defendant owned or had access to an implement with which the crime could have been committed.

The possession by the defendant of a weapon or implement of crime is relevant even though there is no evidence that it was used in the commission of any particular crime, but there must be evidence that some crime was committed.

The possession or ownership of the weapon or implement of crime must be reasonably proximate to the commission of the crime. If too great a period has elapsed between the commission of the crime and the period of possession or ownership, the evidence would be too remote and hence inadmissible. Thus, in a prosecution for assault with intent to kill, the admission in evidence of the finding of a weapon on the person of the accused when he was arrested, nearly a month after the assault, was prejudicial error."

dentiary use was therefore a proper element in the prosecution's case.⁹

Appellant assigns as error the admission of certain photographs of decedent and several items of her clothing, including the knotted stocking which was one of the murder weapons. It is well-settled law in this Commonwealth that "the admission of photographs exhibiting the body of a deceased in homicide cases is primarily within the discretion of the trial judge. . . ." *Commonwealth v. Powell*, 428 Pa. 275, 278, 241 A.2d 119, 121 (1968). Moreover, this Court has repeatedly declared that "the proper test to be applied by a trial court in determining the admissibility of photographs in homicide cases is whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors. . . ." *Id.* at 278-79, 241 A.2d at 121. Accord, *Commonwealth v. Ford*, *supra* at 86, 301 A.2d at 858; *Commonwealth v. Eckhart*, 430 Pa. 311, 317, 242 A.2d 271, 274 (1968). This test is also applicable to the other demonstrative evidence, i.e., the clothing, admitted here. See *Commonwealth v. Ford*, *supra* at 85, 301 A.2d at 858.

It is to be noted that the stocking was one of the murder implements. The paramount evidentiary need for this item is obvious. As to the other challenged items, the court found, and we agree that "[t]he photographs aided in the juries' [sic] understanding of the type of injuries inflicted, where and how the deceased was found, the site and position of the deceased, and in very definite corrob-

⁹ Appellant also contends that he was entitled to an instruction that the knife had no evidentiary value. Because the knife was correctly admitted, appellant's point for charge was properly refused.

oration of the oral testimony of witnesses. . . ." More-over, the court stated that "the photographs were [not] at all inflammatory [sic]," and there is no suggestion that the victim was, for example, pictured naked, or that the photographs or items of clothing were gruesome or grotesque.¹⁰ On this record, we hold that the court correctly applied the *Powell* test, that the evidentiary value of the admitted evidence outweighed any potential for prejudice, and that the court did not abuse its discretion in admitting the challenged items.

Appellant also argues that the trial court erred in denying his motion to sequester the Commonwealth witnesses, particularly the state police officers. This Court has previously held that "the question of sequestration of witnesses is left largely to the discretion of the trial Judge and his decision thereon will be reversed only for a clear abuse of discretion." *Commonwealth v. Kravitz*, 400 Pa. 198, 218, 161 A.2d 861, 870 (1960), cert. denied, 365 U.S. 846, 81 S.Ct. 807, 5 L.Ed. 2d 811 (1961); see Pa. R.Crim.P. 326.

In its opinion the court justified its denial of the motion, by explaining that "no witness was called who had not previously testified at the first trial; and examination of all the testimony will indicate that it was much as was given at the first trial of this case." These witnesses were not sequestered at the first trial. The record also establishes that the same police officers who testified at trial also testified a few weeks earlier at the suppression hearing. No request to sequester was then made. We find the court's reasons for refusing to sequester the officers convincing, and find no abuse of discretion.

¹⁰ We also note that the court in its discretion did not allow these allegedly inflammatory items into the jury room.

It is also argued that the trial court variously erred in its instructions to the jury. Only one of these now-asserted challenges, however, was properly raised by specific objection before the jury retired to deliberate. That objection alone can now be reviewed. *Commonwealth v. Watlington*, 452 Pa. 524, 306 A.2d 892 (1973); Pa.R. Crim.P. 1119(b). The objection is to an allegedly improper expression of the court's opinion that the evidence did not warrant a verdict of voluntary manslaughter.¹¹

The trial court expressed the view that if the jury found that appellant did in fact maliciously kill decedent, the court recalled no evidence of extenuating circumstances which would reduce the act to voluntary manslaughter. The court, however, also gave the jurors a full, complete, adequate, and correct charge on voluntary manslaughter, and instructed them that voluntary manslaughter was an entirely permissible verdict. The trial judge also specifically instructed the jurors that their recollection of the testimony, and not his, controlled, that his opinion was no more than a gratuitous observation, and that the jury could and should return any verdict it felt justified. Moreover, the court did not express an opinion as to guilt or innocence or suggest that the jury return any particular verdict. The charge, read in its entirety, removed nothing from the province of the jury nor did it contain any judicial expression of guilt. The charge therefore was proper. *Commonwealth v. Archambault*, 448 Pa. 90, 290 A.2d 72 (1972); *Commonwealth v. Motley*, 448 Pa. 110, 289

¹¹ Appellant also argues that the court overemphasized the crime of murder in the first degree, and that it did not, while reviewing the evidence, sufficiently stress the jury's role as fact-finder.

A.2d 724 (1972); see *Commonwealth v. Miller*, 448 Pa. 114, 124-26, 290 A.2d 62, 67-68 (1972).

Appellant complains that the court erred in denying his motion for a mistrial based on allegedly inflammatory and prejudicial remarks by the prosecutor in his closing argument.¹² We are satisfied, as was the trial court, that the prosecutor's remarks were limited to the facts in evidence and the legitimate inferences therefrom, and consequently cannot be deemed improper. See *Commonwealth v. Goosby*, 450 Pa. 609, 301 A.2d 673 (1973); American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function §5.8 (Approved Draft, 1971).

Finally, appellant contends that if the oral admission, the pocketknife, the clothing and photographs, and the items seized from appellant's automobile were improperly before the jury, then the remaining evidence could not sustain any verdict of guilty. Since we have determined that those items of evidence were properly admitted, this challenge must fail. Reviewing all the record evidence in the light most favorable to the Commonwealth, we are satisfied that the jury reasonably could have found, beyond a reasonable doubt, all the elements of murder in the first degree, and that the evidence therefore is sufficient to sustain the verdict. *Commonwealth v. Lee*, 450 Pa. 152, 154, 299 A.2d 640, 641 (1973).

Judgment of sentence affirmed.

POMEROY J., concurs in the result.

¹² It is contended that the prosecutor improperly commented on the gravity of the crime charged, that the inferences he drew from the evidence tended toward the speculative, and that he improperly defended, after appellant had attacked, the competence of the state police.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No. 81-234

Jon E. Yount, pro se,

Petitioner

—vs.—

Ernest S. Patton, Superintendent, SCI—Camp Hill,

Respondent

and

Harvey Bartle III, Attorney General of the Commonwealth
of Pennsylvania,

Additional Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS

AND, now comes the petitioner, Jon E. Yount, pro se, and moves this Honorable Court for leave to proceed with this Petition for a Writ of Habeas Corpus *in forma pauperis* pursuant to Title 28 U.S.C. §1915, without first being required to pay fees and costs or otherwise being required to give security therefor. In support of this motion, Petitioner has attached his Affidavit of Poverty hereto.

Respectfully submitted,

(s) Jon E. Yount

Jon E. Yount, Petitioner

P.O. Box 200; C-8297

Camp Hill, Pa. 17011

Dated: January 5, 1981

AFFIDAVIT OF POVERTY

[Caption Omitted]

I, Jon E. Yount, being first duly sworn, depose and say, in support of my Motion to Proceed *in Forma Pauperis*, that:

1. I am the Petitioner in the above entitled case;
2. I believe that I am entitled to relief;
3. Because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor;
4. I am unemployed except for my prison wage which amounts to approximately \$45.00 per month;
5. I have received no money during the past twelve months from any business, interest, dividends or any other source of income except gifts from my family which totaled \$50.00-\$100.00;
6. I do not own cash, or do I have money in a checking or savings account except in my prison account which is \$34.80;
7. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property; and
8. I have no persons other than myself dependant upon me for support.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

(s) Jon E. Yount
Jon E. Yount, Petitioner
P.O. Box 200; C-8297
Camp Hill, Pa. 17011

[Jurat Omitted]

PETITION FOR WRIT OF HABEAS CORPUS

[Caption Omitted]

Comes the Petitioner, Jon E. Yount, and moves this Court pursuant to Title 28 U.S.C. §2254 to issue a Writ of Habeas Corpus. In support of his petition, Petitioner shows and alleges:

1. The name and location of the court which entered the judgment of conviction under attack is the Court of Oyer and Terminer, Clearfield, Clearfield County, Pennsylvania.

2. The date of judgment of conviction was November 20, 1970; effective date of sentence was April 29, 1966.

3. The length of sentence imposed by John A. Cherry, P.J., was life imprisonment.

4. Petitioner was convicted of Murder of the First Degree.

5. Petitioner's plea was "not guilty".

6. Petitioner was convicted by a jury of twelve.

7. Petitioner did not testify at trial.

8. Petitioner did appeal from the judgment of conviction.

9. Petitioner's appeal to the Supreme Court of Pennsylvania was denied on January 24, 1974; this followed the denial of his direct appeal by the Trial Court.

10. Other than a direct appeal from the judgment of this conviction and sentence, petitioner has not filed any petitions, applications or motions with respect to this judgment in any court, state or federal.

11. Petitioner bases his claim that he is being held unlawfully on three grounds as follows:

12-A. PETITIONER'S CONVICTION WAS OBTAINED BY A VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION THROUGH THE USE OF ORAL STATEMENTS ELICITED WITHOUT REQUIRED MIRANDA WARNINGS.

The victim, Pamela Sue Rimer, an 18-year-old high-school student, was slain at Luthersburg, Pennsylvania, at approximately 5:00 PM on April 28, 1966. The police obtained a description of the suspect, one that quite accurately fit Petitioner, from two witnesses, as well as a description of the vehicle that the suspect was seen driving near the scene of the crime. These descriptions, along with the fact that Petitioner, a teacher of the victim, was seen to have been driving a vehicle similar to that broadcast on police radios, were known to investigating state police. There were no other suspects and no other major incidents in the Luthersburg area; the state police conducted a continuous, intensive investigation from the evening of April 28 when the body was discovered at approximately 5:30 PM until Petitioner voluntarily appeared at the Pennsylvania State Police Substation in Luthersburg at 5:30 AM, April 29, 1966. Trooper Phillips, the officer in charge of communications in the investigation, confronted Petitioner at the door of the substation, asked him what he wanted—to which Petitioner replied "I'm the man you are looking for", and, after having him repeat this statement, asked if he was referring to the "Luthersburg incident"; Petitioner responded "Yes".

Petitioner was well-dressed and fit the description broadcast (dark suit, light shirt, car coat, crewcut, dark-rimmed glasses). Tpr. Phillips had Petitioner come into

the substation and sit down, hurriedly awakened Tpr. Bedford and Detective Kerr—asleep in nearby rooms, explained to them that there was a man at the desk who said he was the man they were looking for in regard to the Luthersburg incident, returned to Petitioner within 1-1½ minutes because he did not want to leave him alone, and then confiscated the operator's license from Petitioner's wallet. Tpr. Bedford and Det. Kerr immediately came into the communications room, each in turn looking at Petitioner's operator's license for identification purposes (the license was never returned to Petitioner), took him into a small, adjacent office, searched him, confiscated a pocket knife that was in his possession, and then asked Petitioner: "Why are we looking for you?" to which he allegedly replied "I killed that girl." Det. Kerr claims to have then asked "What girl?" to which Petitioner allegedly responded "Pamela Rimer." Kerr continued "How did you kill this girl?"; Petitioner allegedly replied "I hit her with a wrench and I choked her."

The Commonwealth concedes that no *Miranda* warnings were given to Petitioner by any officer prior to this point. The alleged oral admissions "I killed that girl." and "Pamela Rimer." were introduced into evidence at trial over objection by Petitioner; he was convicted of murder of the first degree. Petitioner contends that given (a) the description of the suspect available to police which almost precisely fit Petitioner as he stood before Phillips, Bedford and Kerr in the substation, (b) the voluntary initial statements made to Tpr. Phillips at the door of the substation and related to Kerr and Bedford before they confronted Petitioner, (c) that no other incidents of note occurred in Luthersburg, (d) that Phillips, Kerr and Bedford did not return Petitioner's operator's license, (e) that the police

officers took Petitioner into a small interrogation room, (f) searched him, (g) confiscated his pocket knife, and (h) telephoned other police officers, all before eliciting the two oral statements admitted over objection at trial, clearly demonstrates that Tpr. Phillips, Tpr. Bedford and Det. Kerr had no doubt why Petitioner had come to the substation, and even more relevant, left absolutely no doubt in Petitioner's mind that he was in custody, and if not technically under arrest, was the focus of the investigation and was not free to leave the substation.

Det. Kerr later testified that he would have used any legal means to keep Petitioner from leaving the substation. Of course, without his operator's license, Petitioner could not legally drive away from that *very rural* substation. Therefore, Petitioner contends that full Miranda warnings were required before police conducted custodial interrogation and asked questions that were not only likely but intended to elicit incriminating statements on which his conviction was to be based.

(For additional information, refer to the accompanying brief.)

12-B. PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO SELECT AND EMPANEL A FAIR, IMPARTIAL AND "INDIFFERENT" PETIT JURY.

Petitioner, a high-school teacher, was arrested on April 29, 1966 and charged with murder and rape in connection with the slaying of one of his students, Pamela Sue Rimer. The rural county of Clearfield (population — 80,000; registered voters—34,000) was inundated with newspaper, magazine, radio and television accounts of details of the crime, arrest and arraignment of Petitioner,

preliminary hearing, and other pre-trial hearings. Throughout the lengthy trial, beginning September 28, 1966, during which he was convicted of rape and murder of the first degree following a plea of "not guilty by reason of insanity", and during post-trial motions and appeals, the deluge of publicity continued. Considerable attention was given by the media to Petitioner's alleged confessions to the police which were introduced at trial. Most prejudicial was the daily newspaper, radio and television coverage of Petitioner's admissions of commission of the *homicide* during his testimony at this first trial.

In June, 1969, following 2½ years of continued publicity surrounding his appeals, the Pennsylvania Supreme Court reversed Petitioner's conviction on the basis of inadequate *Miranda* warnings, a decision that was appealed by the Commonwealth to the United States Supreme Court where certiorari was denied. These events, unprecedented in Clearfield County, caused an even greater surge of local media coverage, concentrating, as did the opinion of the court reversing the conviction, on the alleged confessions and admissions of guilt by Petitioner. Pre-trial motions were again conducted, and again prospective jurors were bombarded with prejudicial details. Although the Commonwealth did not prosecute the charge of rape at retrial, the media continued to "inform" the citizenry that Petitioner was to be retried for murder *and rape*, and continued to do so well into the retrial when Petitioner personally informed reporters in the courtroom of their error. Of course, no retraction was printed, and it was from this "informed" populace that fair and impartial jurors were to be empaneled.

Pre-trial hearings were conducted on June 5, July 29, August 17, and November 3, 1970 by the Trial Court, all

accompanied by prejudicial publicity; the Trial Court denied Petitioner's pre-trial motion for a change of venue. During Voir Dire, which encompassed eleven working days, five panels of prospective jurors were called, examined and exhausted at the expense of Petitioner's peremptory challenges; Petitioner renewed his Motion for Change of Venue upon exhaustion of each panel of prospective jurors and each motion was denied by the Trial Court. Petitioner's statistics reflect that of 158 persons who underwent Voir Dire, 82% held opinions with respect to his guilt or innocence (none volunteered an opinion that he was innocent!) and 70% had "fixed" opinions. Evidence was elicited during Voir Dire that prospective jurors had been intimidated by efforts to influence decisions against Petitioner if those jurors were chosen to serve on the jury. Of 117 prospective jurors who were asked about their knowledge of the case, 94% indicated they had either read newspaper and/or magazine accounts of the case, 76% had discussed, heard discussed and/or heard opinions expressed about this case, and 32% admitted hearing and/or seeing radio and television coverage of the case.

Of the twelve seated jurors, nine stated they had read about or heard about the case on radio and/or television, seven stated they had discussed the case with others or had heard it discussed, at least seven stated that they had held—or still held—opinions regarding Petitioner's guilt, and despite the fact that all indicated they would judge the case on the evidence, two stated that they would require Petitioner to prove his innocence. Three stated they wanted to be on the jury, and one, selected after exhaustion of Petitioner's peremptory challenges, had been a client of the District Attorney and had worked for the prosecutor's elec-

tion. This bias did not merely involve one or two jurors, but permeated the entire jury. Petitioner contends that such a jury falls far short of meeting the constitutional requirements of a jury that is "fair, impartial, and 'indifferent' ". Petitioner also contends that the Trial Court made several erroneous rulings during the course of Voir Dire on his challenges for cause that effectively eliminated whatever improbable opportunity Petitioner had of selecting and empaneling a fair jury.

(For additional information, refer to the accompanying brief and attached appendices.)

12-C. PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL AS A RESULT OF THE TRIAL COURT'S PREJUDICIAL CHARGE TO THE JURY AND INCLUDED ERRONEOUS INSTRUCTIONS.

Pennsylvania has no statutory definition of murder. The Court relied on the following statute in its charge: "All murder which shall be perpetrated by means of poison, or by lying in wait or by any other kind of willful, deliberate and premeditated killing shall be murder in the first degree. All other kinds of murder shall be murder of the second degree." Petitioner did not testify at his retrial. The Commonwealth built its case on proof of a *corpus delecti* and an alleged simple admission of the commission of the homicide by Petitioner for a finding of guilty of murder of the first degree. With no eyewitnesses to the actual killing, and with only a pocket knife—seized from Petitioner upon his arrest—that contained no traces of blood, the jury was requested to, and did, find malice and intent to kill in this case. In light of this "evidence", and the

foregoing description of the biased convicting jury, Petitioner contends that the following instructions to the jury by the Trial Court were highly prejudicial and constituted harmful and reversible error.

(a) The Trial Court placed undue emphasis on instructions regarding murder of the first degree, beginning its discussion and definitions of possible verdicts with first-degree murder, rather than with murder in general or murder of the second degree. The implication of these instructions, read as a whole, is that all murder is first-degree murder unless it is proven that *intent did not exist* rather than the constitutionally-correct requirement that the Commonwealth prove intent to kill before murder of the second degree may be elevated to first-degree murder.

(b) The Trial Court not only began its instructions regarding possible verdicts with murder of the first degree, but *emphasized* unnecessary and prejudicial instructions, prior to deliberation by the jury regarding petitioner's guilt or innocence, that placed before the jury the penalties prescribed by law in cases of first-degree murder convictions. The Trial Court stressed that the law had removed the jury's right to impose the death penalty in this case. Despite the fact that the Court later made a single comment that the jury was not to be concerned with penalty, the instructions that included only the penalties of either "life" or "death" may well have led *this* jury to believe that all murder now carried a penalty of life imprisonment and that the jury need not dwell on the differences between first and second degree murder. Certainly, the issue of penalty for any verdict had no place in the Pennsylvania two-stage system prior to a verdict of murder of the first degree; but, if the Trial Court chose to inject these penalty-instructions prematurely, a fair trial would have required

that the Court also inform the jury of available penalties for all possible verdicts.

(c) The Trial Court instructed the jury that every person is *presumed* to intend the natural and probable consequences of his act, and that the *intentional*, unlawful and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption that *malice* and *intent to kill* existed. The Court described the presumption as a "presumption of fact"; no distinction was made between a presumption of law and one of fact, and, although the Court instructed the jury that the presumption of malice and intent to kill was rebuttable, it did not instruct the jury regarding the burden of providing proof of such intent or of the rebuttal of that intent. A reasonable juror could have concluded that the presumption of malice and intent to kill was a burden for the Petitioner to overcome after the Commonwealth had overcome a similar presumption of his innocence. This would unconstitutionally shift the burden of proof to Petitioner, especially with a jury so predisposed to convict.

(d) Petitioner's defense at trial consisted entirely of evidence of good character and reputation. The Trial Court instructed the jury, on several occasions, that evidence of good character could be applied only to the issue of innocence or acquittal. Petitioner can find no such statutory limitation, and such a narrow application of evidence of good reputation is neither realistic or just; if good character, as instructed by the Court, could, in itself, preclude a jury from finding Petitioner could kill, it could preclude the same jury from finding a state of mind capable of malice and/or intent to kill. If a juror assumed that the burden was on Petitioner to rebut the presumption of malice and intent to kill referred to previously, then the

Trial Court's instructions that his only evidence in defense could not be applied to rebut malice and/or intent, but only guilt, unconstitutionally prejudiced Petitioner's cause.

(e) Although Voluntary Manslaughter is a lesser included offense in a Pennsylvania murder indictment, the Trial Court initially — and emphatically — instructed the jury, despite Petitioner's argument for such a verdict, that "there is nothing in this case that would allow you to bring in a verdict of Voluntary Manslaughter. There is no evidence of any sufficient cause of provocation. . . ." The Court, on at least three *later* occasions, emphasized that there was no evidence of "legally adequate" provocation to warrant a verdict of manslaughter, but that this was the opinion of the Court and that the jury was not bound by that opinion and had the right to return such a verdict. Petitioner does not dispute the Court's right to state its opinion *fairly* if it does not, as did the first instruction stated above, remove the jury's right to return a verdict of Voluntary Manslaughter. Petitioner does contend that for the Trial Judge, as the courtroom's undisputed symbol and source of the law, to emphasize his opinion on at least four different occasions that there was no evidence of legally adequate provocation, while never defining either "legally adequate" or "sufficient" provocation, to warrant a verdict of Voluntary Manslaughter, was harmful error.

The Trial Court also stressed that there had been no evidence presented to reduce or mitigate malice to manslaughter. This is error because, by definition, a malicious killing cannot be *reduced* to manslaughter. But, again, the Trial Court did not instruct the jury that the burden of providing such evidence was not on Petitioner. The Court had removed Petitioner's only evidence from consideration by its instructions regarding good reputation. Petitioner con-

tends that a fair and impartial jury may have determined from the Commonwealth's evidence and from his evidence of good character—if permitted to consider it for *degree* of guilt, that (i) Petitioner had quickly surrendered to—and cooperated with—the state police, (ii) the victim had voluntarily accepted a ride from Petitioner whom she knew, (iii) an argument ensued that unjustifiably threatened Petitioner, (iv) he acted out of uncontrollable anger and fear in a multi-faceted attack of hitting, slashing and choking consistent with provocation, fear and anger, (v) in a panic, he had left the victim breathing and obviously alive (for as much as thirty minutes) and drove by witnesses in a weaving and erratic fashion, and (vi) his good reputation was such so as to preclude his actions with malice and/or intent, all of which was evidence from which provocation and passions such as anger and fear could have been inferred by a reasonable juror. These inter-related instructions denied Petitioner a fair and impartial trial by jury.

(f) Finally, it was unnecessary and prejudicial for the Trial Court to include in its instructions to the jury that the Court had affirmed *all* points for charge submitted by the Commonwealth but had denied *all* of Petitioner's points for charge. Petitioner does not possess a copy of either of those points for Charge; however, there could be no possible relevance in the above instruction and it could only serve to prejudice the jury against Petitioner. The instruction that the Commonwealth had "charged" that Petitioner had maliciously killed the victim, with no further explanation by the Court regarding "points for charge", would imply to the jury that only the points and arguments—and "charge"—presented by the Commonwealth had merit in the eyes of the law (Court).

In conclusion, Petitioner contends that these instructions, read as a whole, prejudiced his right to a fair and impartial trial *by jury*, especially when given the biased jury as previously described. (For additional information, refer to the accompanying brief.)

13. All claims for relief stated above were presented to the Trial Court and the Pennsylvania Supreme Court. Although defense counsel *specifically* objected to the Court's charge only regarding the instructions described in 12-C (a) (e) above, a *general* objection to the charge was made by counsel. However, the Pennsylvania Supreme Court held that the charge, read in its entirety, removed nothing from the province of the jury and, therefore, was proper.

14. Petitioner has no petition or appeal now pending in any court, either state or federal, as to the judgement here under attack.

15. The following attorneys represented Petitioner in the various stages of the judgement attacked herein:

At preliminary hearing: David Blakely; DuBois, Pennsylvania.

At arraignment and plea: Homer W. King; Pittsburg, Pa.

At trial: Homer W. King; Pittsburg, Pa.

At sentencing: David Blakely; DuBois, Pa.

On appeal: Homer W. King; Pittsburg, Pa.

16. Petitioner stands convicted of only one count of one indictment—murder of the first degree.

17. Petitioner has no future sentence to serve after completing the sentence imposed by the judgement under attack herein.

WHEREFORE, Petitioner prays that the court grant Petitioner relief to which he may be entitled in this procedure.

Executed at: Camp Hill; Cumberland County, Pennsylvania.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: January 5, 1981

(s) Jon E. Yount
Petitioner

**ANSWER TO PETITION FOR WRIT OF HABEAS
CORPUS****[Caption Omitted]**

AND NOW, comes the Respondents, Superintendent Patton and the Commonwealth of Pennsylvania by Thomas F. Morgan, Esquire, District Attorney of Clearfield County, and F. Cortez Bell, III, Esquire, Assistant District Attorney of Clearfield County, and respectfully answers the Petition for Writ of Habeas Corpus as follows:

I. Procedural History of Case

Petitioner was originally arrested on or about April 29, 1966 on charges of Murder and Rape filed to No. 2 May Sessions 1966 in the Court of Quarter Sessions of Clearfield County, Pennsylvania. The case was certified to Oyer and Terminer on September 26, 1966, and proceeded to trial on September 28, 1966, after completion of the selection of a jury. On October 7, 1966, the Petitioner was pronounced guilty by jury verdict of murder of the first degree and rape. The jury further pronounced sentence as life imprisonment. Following denial of post-trial motions, Petitioner appealed from the judgment of sentence to the Supreme Court of Pennsylvania (*Commonwealth vs. Yount*, 435 Pa. 276, 256 A.2d 464 (1969)). The Supreme Court of Pennsylvania reversed the conviction and ordered a new trial on the basis of *Miranda vs. State of Arizona*, 384 U.S. 436 (1966), which had been decided in the period of time between the date of Petitioner's arrest and the date of his trial. The Commonwealth appealed the ruling of the Pennsylvania Supreme

Court with certiorari having been denied at 397 U.S. 925 (1970). Prior to retrial, hearings were held on or about June 4, 1970, July 29, 1970, and August 17, 1970, with regard to Petitioner's pre-trial motions as to Change of Venue and Suppression of Confession and Evidence Obtained Therefrom. The Court by Memorandum and Order filed September 21, 1970, denied the Change of Venue request and indicated that it would be bound by the guidelines as to suppression of evidence as set forth by the Supreme Court of Pennsylvania in its opinion rendered in the instant case found at *Commonwealth vs. Yount*, 435 Pa. 276, 256 A.2d 464 (1969) cert. denied 397 U.S. 925 (1970). A copy of the Lower Court's Memorandum and Order dated September 21, 1970, is attached hereto, incorporated herein and marked as Commonwealth's Exhibit "A". A second Petition for Change of Venue was filed November 13, 1970, during jury selection for the instant case, but was denied by Memorandum and Order of the Court dated November 14, 1970. A copy of the Court's Memorandum and Order is attached hereto, incorporated herein and marked as Commonwealth's Exhibit "B".

Jury selection for the retrial commenced November 4, 1970, with the actual trial beginning on November 17, 1970. On November 20, 1970, the jury in the instant matter returned a verdict of guilty of murder of the first degree. The rape charge was not tried by the Commonwealth at retrial. The jury further returned a sentence of life imprisonment, they being bound by law to impose no higher sentence. Post-Trial Motions were filed November 27, 1970, and were subsequently denied on January 15, 1973, by Opinion and Order of the Court, after awaiting completion of a full trial transcript at defense counsel's request.

A copy of the Court's Opinion and Order is attached hereto, incorporated herein and marked as Commonwealth's Exhibit "C".

The Petitioner was formally sentenced March 26, 1973, and appealed to the Supreme Court of Pennsylvania. That Court by opinion found at *Commonwealth vs. Yount*, 455 Pa. 303, 314 A.2d 242 (1974) affirmed the judgment of sentence.

The Petitioner has filed seven (7) applications to the Pennsylvania Board of Pardons for commutation of life imprisonment to life on parole during the years of 1973, 1975, 1976, 1977, 1978, 1979 and 1980. Each application has been denied. This is Petitioner's first Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254.

II. Factual History of Case

Only the factual history of the case relevant to the present Petition for Writ of Habeas Corpus proceeding will be outlined below.

On April 28, 1966, the body of Pamela Sue Rimer, a senior at DuBois Area High School, who resided near Luthersburg, Pennsylvania was found in a wooded area adjoining a red-dog road leading from her school bus stop to her rural home. The autopsy revealed that the cause of death was due to shock, loss of blood, and strangulation due to an excess of blood in her lungs. Examination revealed numerous wounds about the girl's head caused by a blunt weapon, three slashes across her throat and cuts of the fingers of her left hand, caused by a sharp instrument. When found, the girl's body was not fully clothed, in that one stocking and one shoe had been removed and the stocking tied about her neck.

At approximately 5:45 a.m. on the morning of April 29, 1966, the Petitioner, Jon E. Yount, a teacher at the DuBois Area High School who had the dead girl in one of his classes, presented himself at the Pennsylvania State Police Substation near DuBois, Pennsylvania and advised the desk officer who answered the door, "I am the man you are looking for." (Trial N.T. 250-251, 256-257). The officer asked the Petitioner if he meant that incident in Luthersburg to which the Petitioner responded "Yes". (Trial N.T. 251, 256-257). The officer then asked the Petitioner to enter and be seated. The desk officer then left the Petitioner unattended and proceeded to a back bedroom where he awoke a detective and another officer and informed them as to Petitioner's presence. (Trial N.T. 252, 257-258). After dressing, the detective and second officer entered the front office. At that time, the detective asked Petitioner, "Why are we looking for you?" (Trial N.T. 271). Petitioner responded, "I killed that girl." (Trial N.T. 271). The detective immediately inquired, "What girl?" The Petitioner responded "Pamela Rimer." (Trial N.T. 271). Petitioner was then at that time advised as to his right to counsel, to remain silent, etc., but not of his right to free counsel. This occurred prior to the holding in *Miranda vs. State of Arizona*, 384 U.S. 436 (1966). The Petitioner then proceeded to give two very detailed confessions as to his responsibility for the death of Pamela Sue Rimer in which he fully confessed his guilt.

At the retrial of this case, the Lower Court suppressed all statements and confessions made by the Appellant after he was incorrectly advised of his Constitutional rights under *Miranda*. Only the three specific statements of the Appellant, set forth fully above, were allowed into evidence.

III. Answer

The Respondents would respectfully, based upon the information as summarized in Sections I and II of this response, answer this Petition for Writ of Habeas Corpus as follows:

1. Paragraph 1 of the Petition is admitted, and it is further averred that the full and proper current name of said Court is:

The Court of Common Pleas of Clearfield County
Clearfield County Court House
Clearfield, Pennsylvania 16830

2. Paragraph 2 of the Petition is admitted.

3. Paragraph 3 of the Petition is admitted.

4. Paragraph 4 of the Petition is admitted.

5. Paragraph 5 of the Petition is admitted.

6. Paragraph 6 of the Petition is admitted.

7. Paragraph 7 of the Petition is admitted.

8. Paragraph 8 of the Petition is admitted, and it is further averred that appeal was made to the Supreme Court of Pennsylvania to No. 357 January Term, 1973, with opinion filed to *Commonwealth vs. Yount*, 455 Pa. 303, 314 A.2d 242 (1974). Said opinion having been filed January 24, 1974.

9. Paragraph 9 of the Petition would be admitted with regard to the denial of Petitioner's appeal to the Supreme Court of Pennsylvania, and Paragraph 9 would be denied as to the trial court denial of his direct appeal. In this regard, the Respondent would aver that the trial court denied Petitioner's post-trial motions and not his direct appeal.

10. Paragraph 10 is denied as stated. Respondents would aver that Petitioner has also filed seven (7) applications to the Pennsylvania Board of Pardons for commutation of life imprisonment to life on parole during the years of 1973, 1975, 1976, 1977, 1978, 1979 and 1980. Each application has been denied.

11. Paragraph 11 is denied.

12-A. Paragraph 12-A and any sub-paragraphs located thereunder of the Petition are denied. The Respondents would aver that the Petitioner's conviction was not obtained as a violation of his privilege against self-incrimination. Any and all oral statements of the Petitioner which were admitted at trial were so admitted without any violation of Petitioner's *Miranda* or other Constitutional rights. It would be specifically denied that the police had obtained a description of a suspect which quite accurately fit the Petitioner. As indicated in the transcript of the suppression hearing held August 17, 1970, at page 24, investigator Bundy indicated that the description broadcast over the radio described a male individual in his late 20's who was wearing a dark coat with a white shirt and no hat. It would be submitted that this description could fit any number of individuals. Said person was supposed to have been driving a dark green or bluish-green colored station wagon with a chrome rack on the rear. Said individual was not a primary suspect in the case, and the description was broadcast solely because the individual and vehicle were seen driving through the area at the time the crime occurred.

It is further indicated that the investigating officers to whom the Petitioner made any statements were aware that the Petitioner owned or had been driving a vehicle

similar to that in question. The record of the suppression hearing held August 17, 1970, indicates that Detective Kerr was not informed as to the name Jon Yount or the fact that he allegedly owned a station wagon until after the oral statements had been made. (See August 17, 1970 evidentiary hearing transcript, pages 13 & 20; trial transcript pages 275, 277, 285 & 290).

The Respondents would further aver that at the time Petitioner made his voluntary statements to the police which were subsequently admitted into evidence at trial, he was not the prime suspect nor the focus of investigation with regard to the incident.

It would be further averred that at the time the Petitioner appeared at the Pennsylvania State Police substation and indicated to officer Phillips that he was the man they were looking for with regard to the Luthersburg incident, the officer at that time had no knowledge as to who the individual was or why he was there. (Trial transcript—second trial, page 252).

The Respondents would further aver that Tpr. Phillips left the Petitioner alone in the front office while he proceeded to the back bedroom to awaken Tpr. Bedford and Detective Kerr. It would be specifically denied that he did so hurriedly. Respondents would aver that Tpr. Phillips only indicated to Tpr. Bedford and Detective Kerr that there was an individual out front whose identity was unknown to him who indicated that they were looking for him with regard to the Luthersburg incident. (See suppression hearing transcript of August 17, 1970, page 6; trial transcript—second trial, page 252). It would be specifically denied by the Respondents that Tpr. Phillips at any point indicated that he quickly returned to the front

room because he did not want to leave the Petitioner alone. The record is totally devoid of any statements consistent with this allegation. It would be averred that when Tpr. Phillips asked the Petitioner for identification, his wallet and driver's license were voluntarily produced.

The Petitioner alleges that upon entering the room, Detective Kerr and Tpr. Bedford "took him into a small, adjacent office, searched him, confiscated a pocket knife that was in his possession and then asked Petitioner . . ." the various questions which were introduced at trial. The Respondents would specifically deny the above allegation of the Petitioner. The search of the Petitioner and the taking of the pocket knife were done only after the Petitioner had volunteered the statements admitted at trial. (See trial transcript—second trial, pages 265, 267-268, 272 and 273). It would be further denied that the officers took the Petitioner into the small office prior to the time that he voluntarily made the statements introduced at trial. (Trial transcript—second trial, pages 253, 259, 263, 265 and 280). The Respondents would aver that at the time Detective Kerr first approached the Petitioner, he had no knowledge as to his identity or why he was present. Further, he was not in any way a suspect with regard to the incident. (Trial transcript—second trial, page 277; suppression hearing transcript of August 17, 1970, page 2 and 4). The Respondents would aver that the Petitioner was given his rights following the response, "Pamela Rimer."

Petitioner alleges seven items lettered a-h which he feels demonstrate that the officers were aware of why he had gone to the substation and further which he feels left no doubt in his own mind that he was in custody or under arrest. The Respondents would specifically deny each and every one of these allegations as follows:

*Answer to Petition for Writ of
Habeas Corpus*

(a) Respondents would deny that the description available to the officers precisely fit the Petitioner as he stood before them at the substation. As has been previously averred, the description broadcast was that the individual was male, late 20's, wearing a dark coat with a white shirt and no hat. Respondents would aver that such description does not precisely describe this particular individual, the Petitioner. Respondents would further aver that at the time Petitioner stood before them, the officers had no knowledge that he was in possession of or owned a vehicle matching that which had been seen in the area at the approximate time of the crime.

(b) The Respondents would deny the allegation that the voluntary statements made by Petitioner to Tpr. Phillips at the door of the substation in any way placed the officers on guard that the individual who stood before them was the one who committed the crime. As indicated previously in this Answer, Tpr. Phillips solely indicated to Detective Kerr and Tpr. Bedford that there was an individual in the front office who indicated that they were looking for him with regard to the Luthersburg incident. It would be averred that the officers did not know the individual as a result of his statement to Tpr. Phillips, nor did they know whether he was present as a witness, relative, or just what importance and relevance he had with regard to the case.

(c) It would be specifically denied by Respondents that no other incidents of note occurred in Luthersburg. The Respondents would aver that the DuBois State Police substation had jurisdiction over

parts of a three-county area and whether or not there were any other incidents occurring in the Luthersburg area is not within the knowledge of the Petitioner.

(d) It would specifically be denied by the Respondents that Troopers Phillips, Bedford and Kerr at any point "confiscated" the Petitioner's operator's license prior to the time that he was formally placed under arrest. The testimony with regard to the license was that it was voluntarily given to Trooper Phillips for the purpose of identification and that subsequently, Trooper Bedford and Detective Kerr briefly had it in their possession. Trooper Bedford further indicates that it was his impression or thought that the license had been returned to the Petitioner. The Respondents would aver that at no time was the license retained with the purpose of forcing or even suggesting to the Petitioner that he could not leave.

(e) The Respondents would deny that the Petitioner was taken to the small, adjacent office prior to the time that initial questions were asked of him. The testimony at trial indicates that at least some of the questions were initiated prior to or during the time in which the individuals were moving toward the small, adjacent office. Even if Petitioner's allegation is considered to be true, such allegation does not indicate that Petitioner was a primary suspect, under arrest, in custody or the focus of the investigation.

(f) The Respondents would specifically deny the allegation of the Petitioner that he was searched prior to the time that the statements introduced at trial were made. The testimony at trial specifically indicates that no search of the Petitioner was made until

a later point and time. (Trial transcript — second trial, pages 265, 267-268, 272 and 273).

(g) Respondents would specifically deny that the officers confiscated his pocket knife prior to the time when the oral statements admitted at trial were made. The testimony clearly indicates that the pocket knife was obtained after the statements were made. (See trial transcript—second trial, page 265, as well as the pages indicated in the response to paragraph (f) above.

(h) The Respondents would specifically deny that other police officers were telephoned before the voluntary statements admitted at trial were given. The testimony specifically refutes this allegation. (See suppression hearing transcript, pages 8 and 18; trial transcript—second trial, page 282).

The Respondents would deny that the officers at any time had knowledge as to why Petitioner had appeared at the substation. It is averred that at no time was anything done with regard to the Petitioner such that he would be led to believe or could reasonably believe that he was in custody, under arrest, or the focus of any investigation or was not free to leave the substation prior to the time that the voluntary statements introduced at trial were made. Petitioner alleges that Detective Kerr at one point indicated that he would have used any legal means to keep Petitioner from leaving the substation. The Respondents would aver that in response to defense counsel's questioning at the suppression hearing held August 17, 1970, Detective Kerr testified that if Petitioner had wanted to leave prior to the time that anything had been asked of him, he was free to do so and there was nothing legally which the

detective could have or would have done. (See suppression hearing transcript dated August 17, 1970, page 16). It would be averred that the only time that Detective Kerr indicated that he would have used restraint to assure Petitioner's presence would have been if he had a legal reason to do so. Detective Kerr testified on page 16 that to his knowledge he had no such legal reason. Respondents would admit that Petitioner is correct in stating that without his operator's license he could not legally drive away from the substation. The Respondents would aver, however, that the officers had no knowledge as to the means by which Petitioner had arrived. (Trial transcript—second trial, page 268). The Respondents would further aver as has previously been indicated that the officers believed that Petitioner's license had been returned to him.

Respondents would aver that the statements volunteered by the Petitioner were made solely in response to the officers request as to why they were looking for him. Petitioner was not coerced, prompted or urged to incriminate himself. To the contrary, the detective's inquiry was made in response to information volunteered by Petitioner, was of a neutral character and was not interrogative in nature. It was solely to clarify as to why Petitioner was present. The Respondents would aver that Petitioner's response, "I killed that girl", was freely and voluntarily given. The officer's spontaneous response, "What girl?", was clearly proper, as attempting to clarify an ambiguous, voluntary statement. As such, Petitioner's Response, "Pamela Rimer", was also properly introduced as a voluntary statement not subject to the *Miranda* holding. It would be further averred that Petitioner's responses at all times were voluntarily made, were not the subject of co-

ercion, prompting or interrogative influence. It would be denied that Petitioner, prior to making the statement, "Pamela Rimer", was either the suspect of the investigation, the focus of the investigation, in custody or under arrest. The questions were not part of custodial interrogation, nor were they intended by the officers to elicit incriminating statements.

12-B. Paragraph 12-B and all sub-paragraphs thereunder of the Petition are denied by the Respondents. It would be specifically denied that Petitioner's conviction was obtained in violation of his Constitutional right to select and empanel a fair, impartial and indifferent petit jury. It would be further denied by the Respondents that media coverage in any form interfered with the selection of jurors, the trial of the case by those jurors and the ultimate finding of guilt by the panel. It would be specifically denied by the Respondents that there was continued publicity with regard to Petitioner's appeals before the Pennsylvania Supreme Court or the Commonwealth's attempt to appeal the matter to the United States Supreme Court where certiorari was denied. Petitioner further alleges that during pre-trial motions conducted with regard to the second trial, respective jurors were once again bombarded with prejudicial details. The Respondents would specifically deny this allegation. The transcript of the first pre-trial hearing held June 4, 1970, at page 24, indicates that at least a portion of said hearing and all transcripts of testimony were by Order of the Court impounded and sequestered by the Clerk of the Courts to be placed in his custody and not to be shown to anyone without further Order of the Court. Also on page 24, the Court indicates for the record that from the commencement of the hearing to the

present time "no one has been present in this courtroom except the defendant, his subpoenaed witnesses, the attorneys for the defendant who were self-appointed, the District Attorney and his witnesses and Court attaches permitted to be present under the law." A copy of page 24 is attached hereto as Commonwealth Exhibit "D" and is incorporated by reference as if set forth herein. Respondents would aver that none of Petitioner's counsel's Petitions for Change of Venue contained articles from the media on any of the pre-trial matters. Further, Respondents would specifically deny that the media misrepresented in any way that the Petitioner was to be retried on the charges of murder and rape. Respondents would aver that the trial court properly denied each one of Petitioner's Motions for Change of Venue. With regard to the first Motion for Change of Venue, the only evidence that was placed before the Court was a copy of a newspaper article reporting the decision of the Supreme Court of Pennsylvania without editorial comment of any kind. Said article referred to both the majority opinion and the dissenting opinions of the Court. There was further evidence that a radio talk show in the area had received approximately five telephone calls with regard to the Petitioner's case and that the calls were almost equally split as to pro and con. The only other evidence introduced was that there were occasional telephone calls made to the home of the mother and former wife of the defendant, at which time there would be no one on the other end of the line. The Court in its Opinion and Order which has already been attached hereto as Commonwealth Exhibit "A" indicates that there was insufficient evidence presented to show that a fair, impartial and indifferent jury could not be found and, therefore, properly denied the Motion.

With regard to the second Motion for Change of Venue, which was filed with the Court on or about November 13, 1970, the Respondents would once again deny the Petitioner's allegations that said Motion contained evidence that a Change of Venue motion should have been granted and that the Court abused its discretion in this regard. Petitioner alleges that pre-trial publicity during the voir dire influenced the people of the community to his detriment. The Respondents would respectfully deny this allegation. Petitioner's own exhibits which were submitted within defense counsel's November 13, 1970 Motion show that any and all press coverage was totally unbiased and dealt mainly with the jury selection process. These same exhibits indicate, contrary to Petitioner's allegations, that the community as a whole was not prejudicial nor inflamed as a result of his second trial. The defense exhibits as a result of a thorough reading show that on Wednesday, November 4, 1970, there were just six spectators in the courtroom at the time the case was called for jury selection. The newspaper article further indicates that after the noon recess, said six spectators had dwindled to one. The same exhibits indicate that the press reported on November 6, 1970, that there were no spectators present for the morning session, and that on hand for the afternoon session four women appeared, but two stayed only a short period of time before leaving. The same exhibit of the defense indicates in an article published Saturday, November 7, 1970, that on Friday, November 6, 1970, only four spectators appeared at the courtroom, and even they "trickled in and out of the courtroom." It would be further denied by the Respondents that the number of jurors used in voir dire, or the numbers of jurors excused for cause indicated that the community as a whole had formed fixed opinions

or were prejudicial as to Petitioner's cause. The Court in its Memorandum and Order denying the second Change of Venue motion, as already attached as Commonwealth Exhibit "B", indicates that the number of persons used in voir dire and the number of challenges for cause that were granted was not based upon the fact that they each had fixed opinions, but rather was due to the Court's great leniency to the defendant in their right to examine perspective jurors and granting their challenges for cause. The Court further indicated that in the period of the four years since the date of the first trial, the Court could recall little if any talk in public concerning the matter. The Court in the Memorandum once again places on record its observations as to the number of spectators present in the courtroom throughout voir dire. The Court found that there was insufficient adverse publicity or prejudice throughout the community such that a Change of Venue would be needed in order to secure the empanelling of a fair, impartial and indifferent jury.

Petitioner has submitted to the Court in his appendices various portions of text taken from the voir dire examination of various members of the jury panel. The Respondents would deny that such statements taken out of context indicate fairly the true opinions and feelings of the members of the panel. A distorted picture of the actual testimony of each perspective juror is presented. Respondents would further aver that a reading of the entire voir dire will indicate that the Court did not abuse its discretion in refusing the Motions for Change of Venue. Such a reading will reveal the wide leniency given to defense counsel both in the examination of and the granting of challenges for cause with regard to the panel members. Respondents would aver that with regard to the quotations found in

Petitioner's Appendix A, all but two of the persons indicated were not seated on the panel due to the granting of defendant's challenges for cause or the use of peremptory challenges. With regard to the two persons who were placed on the jury whose quotations are included in Petitioner's Appendix A, the defense did not challenge those persons at all, and, in fact, accepted the persons for the jury. Respondents would further aver that of the twelve persons who were ultimately selected for the jury, nine of such persons were accepted by both sides without challenges of any form. It would be further averred that the mere fact that some of the jurors indicated that they had heard of the case or even that they had formed some opinion is not sufficient to claim that the jury was unfair and could not consider the evidence fairly. It would be averred that not one of the jurors selected had a fixed opinion.

Respondents would deny Petitioner's allegation that the Court made erroneous rulings during the course of voir dire with regard to his challenges for cause. Respondents would aver that the record reflects when read as a whole that the Court was most lenient with regard to granting challenges for cause and that in those cases where the challenges were denied, the Court did not abuse its discretion.

12-C. Paragraph 12-C, as well as every one of its sub-paragraphs (a-f) of the Petition are denied. Since every sub-paragraph develops a separate issue, in and of itself, the Respondent shall answer each one individually below. At the outset, Respondents would aver that although the Petitioner, through his counsel, attempted both before the trial court and the Supreme Court of Pennsylvania to attack the Court's charge to the jury on several

issues, only one specific objection to the Court's charge was made by defense counsel at the time of trial. As such, only that one specific issue could properly be considered by the Lower Court and the Supreme Court of Pennsylvania on appeal. (See Pennsylvania Rules of Criminal Procedure, Rule 1119(b)). The only specific objection made by defense counsel dealt with an allegedly improper expression by the Lower Court as to its opinion that the evidence did not warrant a verdict of voluntary manslaughter. (Trial transcript—second trial, page 438). Therefore, the Respondents would aver that some of the issues raised in Petitioner's Petition for Writ of Habeas Corpus were not properly preserved at the time of trial, and thus, could not be presented properly on appeal to the Supreme Court of Pennsylvania. Respondents by answering said issues below do not concede that said issues are properly before this Court for review.

12-C (a) Paragraph 12-C (a) of the Petition is denied, while the Respondents would aver and admit the said issue was attempted to be raised by defense counsel both on post-trial motions and on appeal, in every instance since the issue was not the subject of the specific objection made at trial, the Courts could not properly review it. The Respondents would deny the Petitioner's allegation that the Court's charge either unduly emphasized or improperly explained murder of the first degree. When read as a whole, the charge did not overly stress any one area; it removed nothing from the providence of the jury, nor did it infer or contain any judicial expression as to Petitioner's guilt with regard to the charge of murder of the first degree. The Respondents would aver that the Court did properly instruct the jury as to the relation-

ship of intention with regard to murder of the first and murder of the second degree.

12-C (b) Paragraph 12-C (b) of the Petition is denied. Once again, while the Respondent would admit that said issue was attempted to be raised by defense counsel both on post-trial motions and on appeal, since it was not the subject of a specific objection as required by the Pennsylvania Rules of Criminal Procedure, the Courts would not review it on appeal. The Respondents would specifically deny that the Court improperly advised the jury with regard to the death penalty. Under the circumstances of this case, any statements with regard to the death penalty were certainly true statements of the law and the jury is entitled and required to be aware of the law pertaining to the case. Respondents would aver that in any event, the Court further instructed the jury specifically that it was not to be concerned with penalty whatsoever and that their only determination was to be as to guilt or innocence. (Trial transcript—second trial, page 439). Respondents would aver that the Court's charge to the jury in this regard was not prejudicial to the Petitioner, nor does it constitute an erroneous instruction.

12-C (c) Paragraph 12-C (c) of the Petition is denied. The issue as to presumption of fact, presumption of law and the shifting of any burdens during trial were never raised in any of defense counsel's post-trial motions, post-trial briefs and briefs or argument before the Supreme Court of Pennsylvania. Nor was the issue the subject of a specific objection at the time of trial. As such, it has never been asserted on

appeal. Respondents by answering this issue reserve their right to assert that the issue is not properly before this Court, it having never been asserted on appeal. Respondent would aver that the Court did properly instruct the jury as to any presumptions that might be inferred from the use of a deadly weapon against a vital part of the body. The Court did properly instruct the jury that such presumption was in fact rebuttable, and the instruction was such that it did not unconstitutionally result in the shifting of any burden of proof to the Petitioner.

12-C (d) Paragraph 12-C (d) of the Petition is denied. The issue as to the use of evidence of Petitioner's good character or reputation was never raised in defense counsel's post-trial motions, post-trial briefs or counsel's brief or argument before the Supreme Court of Pennsylvania. Nor was it the subject of a specific objection at the time of trial. As such, it has never been asserted on appeal. The Respondents by answering said issue below reserve the right to assert that this issue is not properly before the Court for review, as it was never raised on appeal. Respondents would deny that the trial court erred with regard to the jury instructions as to evidence of good character and reputation and its use in regard to jury deliberations. It would be further denied that the instruction when read as a whole placed any burden upon the Petitioner. The Respondents would aver that the trial Court's instructions to the jury when read as a whole with regard to this issue were in fact proper.

12-C (e) Paragraph 12-C (e) of the Petition is denied. Petitioner alleges that the trial court improp-

*Answer to Petition for Writ of
Habeas Corpus*

erly stated its opinion with regard to the evidence before the jury pertaining to voluntary manslaughter. Such issue was properly raised by specific objection during trial and was therefore dealt with by the Lower Court and the Supreme Court of Pennsylvania on appeal. Respondents would deny that the Court's expression of its opinion was improper and would aver that the charge to the jury with regard to voluntary manslaughter stressed to the members of the jury that they were not in any way bound by his opinion, that voluntary manslaughter was indeed a permissible verdict and that they did in fact have the power to return a verdict of voluntary manslaughter. Petitioner admits that the Court does have a right to state its opinion, so long as such is done fairly. Respondents would aver that when read in total, the jury charge with regard to voluntary manslaughter was in fact fair, and the Court at no time removed consideration of voluntary manslaughter from the providence of the jury. Respondents would specifically deny Petitioner's allegation that by definition a malicious killing cannot be reduced to manslaughter. Respondent would aver that the law is directly contrary to that position. A killing which is committed with malice can, in fact, be reduced to manslaughter. Petitioner alleges that the jury could have inferred from his evidence of good character six specific items (labeled in his Petition as i-vi). Respondents would aver that several of these specific items listed by Petitioner were not at any point a part of the evidence produced at trial by either the Commonwealth or the defense, and, therefore, any evidence as to good character could not bear any relation, nor could it lead the jury to the inferences

which Petitioner alleges. In specific, during the second trial, there was no evidence produced that the victim had voluntarily accepted a ride from the Petitioner whom she knew (Petitioner's ii), that an argument ensued that unjustifiably threatened Petitioner (Petitioner's iii), that he acted out of uncontrollable anger and fear in a multi-faceted attack of hitting, slashing and choking consistent with provocation, fear and anger (Petitioner's iv). Respondents would therefore aver that the trial Court's instructions with regard to malice, good character and reputation were in fact proper.

12-C (f) Paragraph 12-C (f) of the Petition is denied. The issue as to the Court's granting of the Commonwealth's submitted Points for Charge but denial of the Petitioner's Points for Charge was never raised in defense counsel's post-trial motions, post-trial briefs, nor by brief or argument before the Supreme Court of Pennsylvania. Nor was it the subject of a specific objection at the time of trial. As such, the issue has never been asserted on appeal. The Respondents, therefore, by answering this issue within this Petition would reserve the right to assert that the issue is not properly before this Court for review. Petitioner alleges that the trial Court unnecessarily and prejudicially included as part of its instructions to the jury that the Court had affirmed all of the Points for Charge submitted by the Commonwealth, but had denied all of the defense Points for Charge. Respondents would deny that the instructions with regard to requested Points for Charge were improper or prejudicial to the Petitioner in any manner. The Respon-

dent would aver that the Court stated with regard to requested Points for Charge the following: "All of the Commonwealth's Points for Charge are affirmed, but will not be read because covered by the main charge. All of the Points for Charge of the Defendant are refused and, of course, will not be read." (Trial transcript—second trial, pages 437-438). Respondents would further aver that the instructions as indicated above were properly placed on record by the Court in accordance with the Pennsylvania Rules of Criminal Procedure (Pennsylvania Rules of Criminal Procedure, Rule 1119(a)). The Respondents would aver that the statements by the Court with regard to the requested Points for Charge were indeed relevant, were in fact necessary and were not intended or resulted in prejudice to the Petitioner. The Respondents would respectfully aver that the charge of the Court when read in its entirety was imminently fair, removed nothing from the jury's consideration and did not result in any form of prejudice to the Petitioner. The instructions as stated by the Court were not erroneous.

13. Paragraph 13 of the Petition would be admitted in part and denied in part. While Respondents would admit that the claims for relief stated in Paragraphs 12-A, 12-B and 12-C (e)—dealing only with the alleged improper expression of opinion as to voluntary manslaughter by the trial judge during jury instructions as raised by specific objection—have all been raised and appealed to the Supreme Court of Pennsylvania, it would be denied that the substance of Paragraphs 12-C (c), 12-C (d), 12-C (e)—that portion dealing with the use of evidence of good character and reputation in relation to malice—and 12-C (f) have never been asserted either before the trial court or before

the Supreme Court of Pennsylvania. It would be further averred that the substance of Paragraphs 12-C (a) and 12-C (b), although attempted to have been raised on appeal, could not under the Pennsylvania Rules of Criminal Procedure, Rule 1119 (b) been so raised. The issues were waived at time of trial due to failure of counsel to make a specific objection thereto. Therefore, as to Paragraph 12-C (a), 12-C (b), 12-C (c), 12-C (d), 12-C (e)—that portion dealing with the use of evidence of good character and reputation in relation to malice that was not part of the specific objection—as well as 12-C (f), the issues have not fully been litigated within the remedies available to the Petitioner within the Courts of the Commonwealth of Pennsylvania. The Respondents would therefore deny the Petitioner's allegations that such claims have been fully raised on appeal.

14. Paragraph 14 of the Petition can be neither affirmed nor denied by the Respondents, as such is within the sole knowledge of the Petitioner.

15. Paragraph 15 of the Petition would be admitted to the extent stated. Respondents would further aver that the proper and correct name of counsel at preliminary hearing and sentencing is David E. Blakley, instead of David Blakely as Petitioner alleges. It would be further averred that counsel at trial consisted of Homer W. King, Francis V. Sabino and David E. Blakley, and that counsel on appeal was Francis V. Sabino and Harry R. Ruprecht of Harrison, King, Bowman, Sabino and Gillotti, Pittsburgh, Pennsylvania.

16. Paragraph 16 of the Petition is admitted.

17. Paragraph 17 of the Petition is admitted.

*Answer to Petition for Writ of
Habeas Corpus*

WHEREFORE, the Respondents respectfully request that the Petition for Writ of Habeas Corpus, filed to Civil Action No. 81-234, be dismissed and Certificate of Probable Cause be denied. With respect to Paragraphs 12-A, 12-B and that portion of 12-C (e)—dealing with the alleged improper expression of opinion as to voluntary manslaughter by the trial judge to which specific objection was raised—the Respondents would respectfully request that the Court deny the Petition for Writ of Habeas Corpus on the basis that the allegations lack merit. Respondents would aver that each of these issues have been fully litigated before the Supreme Court of Pennsylvania, and that the decision as made by that Court was indeed proper and fully and accurately applied the prevailing principles of law found both within the Commonwealth of Pennsylvania and the Federal Court system. With regard to Paragraphs 12-C (a), 12-C (b), 12-C (c), 12-C (d), 12-C (e)—that portion dealing with the use of evidence of good character and reputation in relation to malice that was not part of the specific objections raised at trial—as well as 12-C (f), Respondents would assert that the Petitioner has failed to exhaust the remedies available to him in the Courts of the Commonwealth of Pennsylvania. This request is based on 28 U.S.C. Section 2254 (b), wherein it provides that . . .

“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.”

*Answer to Petition for Writ of
Habeas Corpus*

335a

Numerous cases within the Federal Court system uphold and embody this same principle that before a state prisoner may seek Federal Court review, he must first present any and all claims to the highest court of the state. *Preiser vs. Rodrigues*, 411 U.S. 475 (1973); *Braden vs. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *United States ex rel. Trontino vs. Hatrack*, 563 F.2d 86 (3d. Cir. 1977).

Therefore, it is our contention that the Petitioner's claims in the Habeas Corpus Petition are either without merit or that the Petitioner has failed to exhaust the remedies available to him in the Commonwealth of Pennsylvania, and it is respectfully requested that the Petition of Jon E. Yount for a Writ of Habeas Corpus be dismissed and Certificate of Probable Cause be denied.

Respectfully submitted,

(s) F. Cortez Bell, III

F. Cortez Bell, III

Assistant District Attorney

[Certificate of Service Omitted]

PETITIONER'S TRAVERSE TO RESPONDENTS' ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

[Caption Omitted]

AND NOW, comes the Petitioner, Jon E. Yount, pro se, and for his Traverse to Respondents' Answer and Motion to Dismiss states:

1. ADMITTED.
2. No response necessary because of Respondents' answer.
3. No response necessary because of Respondents' answer.
4. No response necessary because of Respondents' answer.
5. No response necessary because of Respondents' answer.
6. No response necessary because of Respondents' answer.
7. No response necessary because of Respondents' answer.
8. ADMITTED.
9. ADMITTED.
10. DENIED. Petitioner has not filed any petitions, motions or applications with respect to this judgement, other than a direct appeal from the judgement of this conviction and sentence, in any court, state or federal. In their

Paragraph 10, as well as in their Procedural History of Case, Respondents have injected the fact that Petitioner has filed seven unsuccessful applications for clemency with the Pennsylvania Board of Pardons.

Petitioner avers that his applications for mercy to the Board of Pardons, whether granted or denied, are irrelevant to the issues before this Honorable Court. The Board of Pardons is not a "court", either in theory or practice. In the *Board of Pardons, Commonwealth of Pennsylvania*, 1979, as prepared, published and distributed by the Board of Pardons, the Board, at page 2, goes to great lengths to distinguish its function in contrast to that of the judicial system; the Board stresses that legal technicalities are the responsibilities of the courts. "The Board of Pardons does not decide guilt or innocence. The Judicial System has that function!" At page 3 the Board reiterates: "The important point to remember is that the applicant has already been found guilty and sentenced through the judicial process. The Board of Pardons determines whether there are sufficient reasons to recommend mercy." In addition to being irrelevant, the fact that Petitioner's applications have been unsuccessful is insignificant considering that the average time served by men on life sentences in Pennsylvania prior to commutation of sentence is sixteen years.

11. DENIED. Petitioner is being held unlawfully as based on the three grounds specified in Paragraphs 12-A, 12-B and 12-C.

12-A. DENIED. Petitioner's conviction was obtained as a violation of his privilege against self-incrimination; the alleged oral statements of Petitioner, "I killed that girl" and "Pamela Rimer", which were admitted at trial over his objection, were so admitted in violation of

his constitutional rights, especially those mandated by *Miranda*.

Prior to the interrogation of Petitioner that elicited those challenged statements, the state police—including the interrogating officers—had obtained a description of a suspect which quite accurately fit Petitioner. According to retrial testimony, two prosecution witnesses described the driver of an automobile seen near the scene of the homicide as “a man” with “a short haircut and dressed up . . . sports coat and tie and so on” (N.T., page 145) and “a neat man” with “a flat-top . . . neat sideburns . . . a white shirt or very very light colored shirt on and a dark colored coat.” The length of the sideburns were “approximately one-half way down the hair . . . below glass bows . . . the temples . . .” (N.T., page 162). At the first trial, one of these witnesses stated (First Trial N.T., page 151) that he reported what he had seen “to the patrolman at the scene, in a green and white cruiser”. Petitioner fit this description precisely when he appeared at the DuBois Substation of the Pennsylvania State Police on the morning of April 29, 1966, approximately twelve hours after the above information had been given to the state police and broadcast to all police cars *from the DuBois Substation*.

Respondents claim that the man so described was not a suspect when Petitioner was interrogated by the police. Such a claim is not supported by the testimony of witnesses. The individual and vehicle were not *merely* “seen driving through the area at the time the crime occurred”. A witness stated at the first trial (N.T., page 143) that this vehicle was the only one that passed him near the scene of the crime at the time it occurred even though there were usually “quite a few cars go down the road”. This *car and driver* drew the attention of two witnesses by the unusual

and erratic manner in which the car was driven as it left the crime scene (First Trial, N.T., pages 143 and 149; Retrial N.T., pages 145 and 158). Both witnesses spoke with state police officers at or near the scene of the crime; it is inconceivable that this vital information would not have been given to the police at that time. Also, tire tracks were discovered in a field near where the victim's books were found (Retrial, N.T., page 163). When the experienced police officers, who had been at the scene of the crime and had participated in the intense on-going investigation during most of the night, confronted Petitioner in the substation, they certainly had to know why he was there and had focused their investigation on him, especially after he had just allegedly stated—and repeated—that he was the man the police were looking for with regard to the “Luthersburg incident”. It is extremely difficult to believe that Tpr. Phillips would have awakened two other police officers merely to determine why Petitioner was there! ! Respondents deny that there were no other incidents of note in the Luthersburg area, claiming that such information is not within knowledge of Petitioner. However, Tpr. Phillips, communications officer at the DuBois substation, testified at the retrial (N.T., page 256) that to his knowledge, there were no other major incidents that day.

Respondents apparently attach some significance to the fact that Petitioner was “alone in the front office” while Tpr. Phillips awakened Tpr. Bedford and Det. Kerr to take charge of the case. Petitioner avers that the police substation was a relatively small, one-story structure with the front office approximately centrally-located; therefore, Tpr. Phillips was not required to lose sight of Petitioner for more than a few seconds—if at all—while in the hallway to awaken the other officers. Although Respondents spe-

cifically deny that Tpr. Phillips hurriedly returned to the front office—with the inherent implications of such actions—because he did not want to leave Petitioner alone, Tpr. Phillips testified at the first trial (N.T., page 313) that, after awakening the other officers, he did not discuss Petitioner's presence with them further because he "was in a hurry to go to the front room because I left him by himself". At that point, Tpr. Phillips asked Petitioner for identification and obtained his wallet from which the officer extracted Petitioner's operator's license, a procedure inconsistent with the normal police procedure when confronting a non-suspect of having the person remove the license from the wallet himself. Also, despite Respondents' claim to the contrary, Tpr. Bedford testified at the retrial (N.T., page 267) that he could not say if he did or did not return Petitioner's operator's license in the substation. Whether or not the police retained the license to keep Petitioner from leaving the substation is not as relevant to this case as the fact that *Petitioner believed* that such was their purpose in confiscating his license—and his pocketknife.

Petitioner does not believe it necessary to respond at length to Respondents' claim that the alleged oral statements were made in the front office *before* he was *taken* into an interrogation room and searched. As emphasized in his petition and accompanying brief, Petitioner recognizes that the testimony of the police at the retrial (the only reference used by Respondents in support of their claim) was drastically inconsistent with that presented at four previous judicial proceedings in this case. During all previous testimony, the officers involved had consistently stated that Petitioner was taken to a sergeant's office and searched prior to eliciting the challenged oral statements. Also, Respondents aver that Petitioner was given his

"rights"—admittedly inadequate under *Miranda*—following the response "Pamela Rimer". Again, the testimony of Det. Kerr (First Trial, N.T., page 318) destroys that contention. Det. Kerr testified that following the above alleged oral statement, he then asked Petitioner "How did you kill this girl?" and Petitioner allegedly responded "I hit her with a ~~whip~~ and I choked her." This testimony is significant since it demonstrates that the trial court made an arbitrary decision as to the point in the interrogation that the police were required to give *Miranda* warnings, a decision that is not supported by the reality of the over-all testimony of police officers.

Respondents aver that Petitioner could have departed from the substation prior to questioning and that the police—in their judgement—would have had no legal reason to detain him. The actions of the police officers involved contradict that contention. In addition to Tpr. Phillips' hurried return to the front office, Tpr. Bedford and Det. Kerr were in such a rush to question Petitioner that they took time to dress only in trousers before coming into the front office to confront Petitioner (First Trial, N.T., page 315). Petitioner avers that the interrogating officers had legal means of detaining and restraining him if he had attempted to flee. Of course, if the police really did believe they could not legally detain Petitioner prior to questioning him and eliciting incriminating statements, that may well explain why they resorted to the illegal interrogation challenged herein.

Finally, Petitioner was prompted and urged by the police to incriminate himself; he was interrogated and did not volunteer the alleged oral statements challenged herein; he was the prime suspect in the investigation at that point, in custody and not free to leave the substation when

questioning by police elicited the challenged statements; and, the police did intend to elicit incriminating statements with their specific questions.

12-B. DENIED. Petitioner's conviction was obtained in violation of his constitutional right to select and empanel a fair, impartial and indifferent petit jury. Respondents aver that the publicity surrounding this case from the time of Petitioner's arrest until the completion of voir dire at retrial did not in any form interfere with the selection of jurors, the trial of the case by those jurors or the ultimate finding of guilt by the panel. Although Petitioner has personal knowledge of the publicity surrounding this case from reading newspaper articles, he does not have a complete file of the newspaper, radio and television coverage of this case. Petitioner can only respectfully request this Honorable Court to subpoena, if necessary, the relevant files of the DuBois Courier Express and the Clearfield Progress, the two daily newspapers circulated within Clearfield County, to determine the validity of his allegations regarding publicity during the above defined period. However, Petitioner believes that adequate evidence of the impact of this intense publicity is available by reading the voir dire of this retrial. He avers that one cannot read the voluminous transcript of this voir dire without feeling the prejudice that oozes from the testimony of prospective jurors.

As confirmed by Respondents' "Exhibit B", Petitioner stated in his Petition for Writ of Habeas Corpus that the Trial Court closed certain hearings regarding this case to the public. However, this exhibit in no way alters the fact that newspapers did carry prejudicial information pertaining to this case each time any judicial activity occurred. The Trial Court, as quoted by Respondents from their Ex-

hibit B, indicated that it could not recall much—if any—talk in public concerning this matter. Petitioner avers that his own “Appendix B” counters this contention by quoting the testimony of citizens from all areas of Clearfield County, including those from DuBois, the presiding judge’s city of residence. Respondents aver that the press coverage of this case was totally unbiased. Petitioner contends that frequent references within newspaper articles that he had confessed to this crime, that he had been convicted of murder and rape, and that he had been granted a retrial because of a technicality regarding his confession could not be considered unbiased or unprejudicial. Petitioner does not question the right of the news media to report such information; however, he does contend that in exercising this right the media has infringed upon the right of Petitioner to a fair and impartial trial, the only remedy for such infringement in this case being a change of venue ordered by the Trial Court.

Petitioner admits that there were days when few spectators were evident in the courtroom; but, those were days during which voir dire was conducted, a relatively unexciting procedure during the trial. Such was not the situation during the examination of witnesses. Regardless, interest in the trial—if measured by physical attendance—is not indicative of the existing prejudice against Petitioner that pervaded Clearfield County. Also, it was apparent from the outset of the retrial that the Trial Court did not intend to change venue for any reason. Although continuing to move for change of venue, defense counsel attempted to make the best of a bad situation and to accept jurors who, despite their stated prejudice against Petitioner, it was desperately hoped could hear the case fairly. Respondents emphasize that Petitioner did not challenge for

cause any of the first ten jurors selected. First, as voir dire progressed, the Trial Court's strict criteria for granting challenges for cause became evident; in other words, what prospective jurors the defense had to work with was the best it was going to get in that county. Second, defense counsel was reluctant to challenge a prospective juror for cause if he did not intend to follow unsuccessful challenges with peremptory challenges. Most of the first ten seated jurors were already extremely biased and counsel chose not to challenge them for cause for fear of losing whatever unlikely chance existed that those jurors could put aside their bias. Petitioner was not in a position to squander his twenty-two peremptory challenges on prospective jurors who had been further prejudiced by unsuccessful challenges for cause. Thus, the defense was forced into a no-win situation because of the bias against Petitioner in Clearfield County and the Trial Court's refusal to grant certain challenges for cause. In Respondents' Exhibit B, page 2, the Trial Court states that great leniency was permitted the defense in questioning prospective jurors. Of course, such leniency, if it did exist, was of little benefit to Petitioner if the bias and prejudicial attitudes uncovered by defense counsel's questions were to be ignored by the Court and proper challenges for cause denied.

Petitioner avers that the issue before this Honorable Court is: Should a man have his life put in jeopardy before such a panel rife with admitted prejudice? Petitioner contends that justice requires more! He reiterates that if one juror would have read about and discussed the case and formed an opinion regarding defendant's guilt, a fair trial *may* have been possible; but, with several such jurors, a fair and impartial trial was inconceivable. The Trial Court abused its discretion by not granting Petitioner's motions

for change of venue; in addition, the Trial Court made several erroneous rulings during the course of voir dire with regard to Petitioner's challenges for cause.

12-C. DENIED. Because all issues herein pertain to the Trial Court's prejudicial and harmful charge to the jury, and for reasons stated in Petitioner's Brief that accompanied his Petition for Writ of Habeas Corpus, all issues presented herein are properly before this Honorable Court.

12-C (a). DENIED. The Trial Court's instructions to the jury overemphasized the possible verdict of murder of the first degree and was prejudicial regarding the relationship between intent to kill and murder of the first or second degree. See Respondents' "Exhibit C", pages 8 and 9.

12-C (b). DENIED. Although the Trial Court's instructions regarding the death penalty in this case may have been accurate, the jury was neither entitled nor required to be aware of this aspect of the law; to the contrary, such instructions are specifically forbidden. No subsequent cautionary instruction(s) by the Court could compensate for this prejudicial error.

12-C (c). DENIED. The issue of intent to kill and its inference from the use of a deadly weapon on a vital part of the body has been a major source of contention both at trial and on appeal. Points for Charge were submitted by defense counsel on this issue; all were refused. The Court's instructions did shift the burden of proof regarding intent to kill to Petitioner by not adequately defining the presumptions involved and informing the jury regarding who carried the burden of proof in each instance.

12-C(d). DENIED. The Trial Court erred by instructing the jury that it could not consider Petitioner's evidence of good character to determine *degree* of guilt but could use it only to determine the question of guilt itself. When read as a whole, the Trial Court's instructions pertaining to evidence of good character and reputation as applied to this case were highly prejudicial.

12-C(e). DENIED. The Trial Court improperly and unfairly stated its opinion with regard to the verdict of voluntary manslaughter and to the evidence before the jury pertaining to that possible verdict. By stating its opinion on at least six occasions throughout the charge, two of which were erroneous, the Trial Court effectively removed from the jury voluntary manslaughter as a potential verdict. Given proper instructions by the Court regarding voluntary manslaughter and evidence of good character, and absent the over-emphasis by the Court that voluntary manslaughter was not a justifiable verdict, the jury could have reasonably inferred the six items labeled in the Petition as "i" through "vi" from the evidence presented at trial, and, therefore, could have arrived at a verdict of voluntary manslaughter.

12-C(f). DENIED. The instructions of the Trial Court with regard to requested Points for Charge were improper, prejudicial and harmful to Petitioner. Petitioner avers that the proper procedure for placing on the record a blanket denial of all of a defendant's Points for Charge, without reading them to the jury, would have been to do so out of the hearing of the jury. Without supplementary instructions that would define Points for Charge for the jurors, the most reasonable inference from the Court's instructions would have been that nothing in Petitioner's

case had merit. These instructions were irrelevant, unnecessary, unfair and harmful.

13. DENIED. Because defense counsel stated a general objection to the Trial Court's instructions to the jury, and because the Pennsylvania Supreme Court held that the charge, read in its entirety, removed nothing from the province of the jury in this case, and, therefore, was proper, Petitioner avers that all issues raised in his Petition for Writ of Habeas Corpus are properly before this Honorable Court for the purpose of determining if the instructions, in part or as a whole, were prejudicial to Petitioner, and, therefore, denied him a fair and impartial trial by jury as guaranteed by the Constitution of the United States. If one accepts Respondents' claim that all issues regarding the Court's charge, not specifically objected to by defense counsel, may not be raised on appeal in the Commonwealth's courts, then it follows that Petitioner has exhausted whatever state remedies that are available to him on these issues and that no state corrective processes now exist.

14. No response necessary because of Respondents' answer.

15. ADMITTED. However, Petitioner avers that his chief contact with the law firm of Harrison, King, Bowman, Sabino and Gillotti, on appeal, was Homer W. King, Esq.

16. ADMITTED.

17. ADMITTED.

WHEREFORE, Petitioner respectfully submits that for reasons stated herein as well as in his Petition for Writ of Habeas Corpus, filed to Civil Action No. 82-0234, and

348a

Traverse to Answer to Petition

the Brief accompanying that Petition, all his allegations have merit; he prays that his Petition for Writ of Habeas Corpus be granted and that this Honorable Court provide him with whatever relief it deems appropriate and proper.

Respectfully submitted,

(s) Jon E. Yount
Jon E. Yount, pro se
P.O. Box 200; C-8297
Camp Hill, Pa. 17011

Dated: April 2, 1981

[Certificate of Service Omitted]

ORDER
[Caption Omitted]

AND NOW, this 16th day of April, 1981, after Jon E. Yount presented a petition for a writ of habeas corpus which he has been granted leave to prosecute in forma pauperis

IT IS ORDERED that the Federal Public Defender is hereby appointed to represent the petitioner;

AND IT IS FURTHER ORDERED that the matter be set for a conference of counsel on April 30, 1981, at 10:00 A.M. before the undersigned United States Magistrate.

(s) Robert C. Mitchell
United States Magistrate

AMENDMENT TO PETITION FOR
WRIT OF HABEAS CORPUS
[Caption Omitted]

AND NOW comes the Petitioner, Jon E. Yount, by his attorney, George E. Schumacher, Federal Public Defender, and files the following Amendment to the Petition for Writ of Habeas Corpus, and in support of the Petition sets forth as follows:

12-D. Petitioner was denied effective assistance of counsel at all phases of litigation before the Court of Common Pleas of Clearfield County, including pretrial procedures, the trial of the case, post-trial procedures and appeal, and as grounds therefor sets forth as follows:

(1) Defense counsel, Homer W. King, Esq., Francis V. Sabino, Esq., and David E. Blakley, Esq. (hereinafter referred to as defense counsel) did not provide adequate and competent representation.

(2) Defense counsel did not provide the standard of adequacy of legal services that in the exercise of the customary skill and knowledge which normally prevailed at the time and place.

(3) Defense counsel failed to provide effective assistance of counsel under the Sixth and Fourteenth Amendments of the Constitution of the United States.

(4) Examples of the failure of defense counsel to provide adequate and competent representation are as follows:

(a) Defense counsel did not provide the necessary investigation and preparation for the change of venue motions.

(i) Clearfield County was inundated with publicity from newspapers, magazines, radio and television concerning the state proceedings that was not introduced into evidence in support of the Motion for Change of Venue.

(ii) A hearing is requested on the within motion at which time Petitioner will offer into evidence the newspaper publicity that will show that the pre-trial of Yount's trial for first degree murder and rape that took place in September of 1966 (hereinafter the first trial), the trial of the first case, post-trial motions of the first case, the appeals from the first case, the reversal by the Pennsylvania Supreme Court, the scheduling of the case for retrial (hereinafter the second trial) and the second trial were so thoroughly covered by the Clearfield newspapers as to result in public prejudice against him that resulted in his inability to secure a fair trial in Clearfield County.

(iii) The allegations in support of the Motion for Change of Venue and the Affidavit of newspaper publication in support of the change of venue and the evidence of the transcript of proceedings before the Hon. John A. Cherry were so incomplete, that there was inadequate investigation and preparation of the documentation in support of the Motion for Change of Venue.

(iv) The incompetent and inadequate presentation of the evidence in support of the Motion for Change of Venue resulted in a decision of Judge

Cherry on September 21, 1970, denying the motion and relying on the limited supporting data not justifying a change of venue.

(v) The Affidavit pertaining to publication in newspapers of general circulation in Clearfield County pertaining to defendant, Jon E. Yount, filed by Homer W. King on November 7, 1980, begins only with a newspaper publication of November 3, 1970 through November 7, 1970, which said Affidavit is incomplete, both as to the overall publicity since the time of the homicide in 1966 and also as to the specific period of time in question.

(vi) The material submitted to the Court in support of the change of venue motions does not include magazine, radio, television or any other sources of publicity in support of the motions.

(vii) Counsel respectfully requests the right to produce additional evidence in support of this contention at a hearing on this petition at which time documentary evidence will be presented, evidence from the investigator for the Public Defender Office will be presented, and defense counsel that represented Petitioner during the state proceedings will be subpoenaed to testify.

(b) Defense counsel did not provide effective assistance of counsel in the investigation, preparation, and representation at the voir dire proceedings of prospective jurors before the Hon. John A. Cherry that commenced on November 4, 1970 as follows:

(i) In permitting the Petitioner to be referred to as the "Prisoner";

(ii) Questioning of jurors, including their exposure to newspapers, magazines, radio, television, etc.;

(iii) Questioning as to connection with law enforcement officials;

(iv) Making challenges for cause in front of jurors;

(v) Not making challenges for cause of all jurors;

(vi) Inadequate investigation, preparation and questioning of jurors to renew Motion for Change of Venue; and

(vii) Additional testimony and evidence that will be presented at a hearing requested on the within petition that will show ineffective assistance of counsel at the voir dire proceedings which said ineffective assistance of counsel denied Petitioner a fair trial, but also resulted in insufficient evidence in support of a renewed change of venue motion.

(c) Defense counsel did not provide effective assistance of counsel by not requiring all Court proceedings be recorded and transcribed including side bar conferences, in camera conferences, arguments, rulings, and any other matters not appearing of record.

(i) Numerous instances of unrecorded proceedings exist in the transcript provided to the Petitioner; for example, at page 206 of the transcript of the trial, "All counsel approach the bench," but nothing is included as to the reasons for the side bar conference, arguments, or the ruling of the Court.

Another example is at page 255 of the transcript. On other occasions, such as page 254 of the transcript defense counsel's argument at side bar is recorded.

(ii) The same procedure of not reporting certain arguments, conferences and rulings occurred during the voir dire portion of the proceedings; for example, at page 86 of the transcript where the transcript is as follows, "We will now recess for legal discussions and resolve this once and for all. 1:59 p.m. Court recessed. 2:10 p.m. Court reconvened. Defendant in Court." Also at page 155 of the voir dire transcript where the record indicates that "All counsel approach bench," but there is no transcript of the proceedings.

(iii) The most glaring and prejudicial absence of record is contained at page 1063 and 1064 where matters pertaining to the change of venue were presented, argued and ruled upon by the Court and yet nothing appears as a matter of record. All that is indicated is that the defendant's Motion for Change of Venue is denied at page 1064 of the transcript; whereas, evidence of the Petitioner will establish that the change of venue issue was raised by the Court and extensive argument took place.

(iv) Wherefore, Petitioner requests that the Court order the transcript of all unrecorded portions of any pretrial, voir dire, trial or post-trial proceedings including side bar conferences, in camera conferences, arguments, rulings, or any other matters relating to the aforementioned, be ordered transcribed by this Court for the examination and inspection of counsel for Petitioner.

(d) Defense counsel did not provide effective assistance of counsel in regard to the sequestration of witnesses during the trial as follows:

(i) The ruling at the trial was adversely affected by prior incompetent and inadequate representation when defense counsel did not request sequestration at the first trial, nor at the suppression hearing.

(ii) Defense counsel failed to provide a proper motion, reasons, and legal authorities to support the motion.

(iii) Additional evidence and testimony concerning this matter will be presented at the hearing requested on the within petition.

(e) Defense counsel did not provide effective assistance of counsel in objecting to the bias and prejudice of the trial court in requesting that the trial court recuse himself from the case and in raising these issues on appeal. The bias and prejudice of the trial court resulted in the denial to Petitioner of a fair trial and evidence in support thereof is as follows:

(i) The conduct of the trial court in denying the Motion for Change of Venue.

(ii) The conduct of the trial court in the questioning during the voir dire proceedings, rulings, and especially in regard to the change of venue motion that occurred at page 1064 of the transcript of the voir dire proceedings and subsequent conduct of the Court during the final stages of the voir dire when jurors obviously prejudiced to the defendant were nevertheless seated to participate as jurors and alternate jurors.

(iii) It was further demonstrated by the Court during the course of the trial in rulings, questions, arguments with defense counsel.

(iv) This contention of the Petitioner will be supported by evidence and testimony at a hearing requested in support of this motion.

(f) Defense counsel did not provide effective assistance of counsel in the following respects:

(i) In failing to object to erroneous rulings of the trial court during voir dire.

(ii) In failing to object to erroneous rulings of the trial court during the trial of the case.

(iii) In not advising Yount as to the relevancy and purpose of evidence.

(iv) In failing to present expert testimony from a pathologist or forensic pathologist.

(v) In conducting the defense in an argumentative manner to place Petitioner and defense in the worst possible light with the jury by raising unfounded objections on uncontested matters, by cross-examination on matters that were not at issue, in arguing with the Court in the presence of the jury, in not raising contested matters out of the presence of the jury, and in other respects that will be elicited on cross-examination of counsel at the requested hearing and by testimony admitted on behalf of the Petitioner.

(vi) In advising Petitioner not to testify on his own behalf because of the possibility that suppressed evidence might then become admissible.

(vii) In failing to object to erroneous instructions.

(viii) In failing to object to Court's charge on evidence of good character and reputation.

(xix) In failing to object to the Court's charge regarding murder in the first degree as it related to other offenses.

(x) In not objecting to the procedure of the Court in explaining possible verdicts that emphasized prior to the deliberations of the jury the penalties prescribed by law in cases of first degree murder convictions, especially the Court's comment concerning the fact that the death penalty could not be imposed and that the jury was concerned only with the penalties of either "life" or "death".

(xi) In failing to object to the instruction that the person is presumed to intend the natural and probable consequences of his act.

(xii) In failing to object to the charge that the intentional, unlawful and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption that malice and intent to kill existed.

(xiii) In failing to object to the trial court's instructions that Yount's evidence of good character and reputation, could not be applied to rebut malice and/or intent.

(xiv) In failing to object to the charge of the Court concerning a possible verdict of voluntary manslaughter.

(xv) In failing to object to the charge of the Court on provocation and the failure of the Court to charge on "legally adequate" or "sufficient" provocation, to warrant a verdict of voluntary manslaughter.

(xvi) In failing to object to the charge of the Court that there was no evidence presented to reduce or mitigate malice to manslaughter.

(xvii) In failing to object to the charge of the Court regarding Yount's testimony of good reputation.

(xviii) In failing to object to the charge of the Court that all of the points for charge submitted by the Commonwealth had been included in the instruction to the jury and that all of Petitioner's points for charge had been denied.

(xix) In not objecting to prejudicial arguments of counsel for the Commonwealth while they were being made but waiting until the conclusion of the entire argument to object.

(xx) Petitioner reserves the right to present additional examples of incompetency at a hearing requested on the within petition.

15. Paragraph 15 of Petitioner's Petition for Writ of Habeas Corpus is amended to include that he was represented at the trial of his case by Homer W. King, Esq. of Pittsburgh, Pennsylvania, Francis V. Sabino, Esq., of Pittsburgh, Pennsylvania and David E. Blakiey, Esq. of DuBois, Pennsylvania.

Respectfully submitted,

(s) George E. Schumacher
George E. Schumacher
Federal Public Defender
Attorney for Petitioner

[Certificate of Service Omitted]

ANSWER TO AMENDMENT TO PETITION FOR
WRIT OF HABEAS CORPUS
[Caption Omitted]

AND NOW, comes the Respondents, Superintendent Patton and the Commonwealth of Pennsylvania by Thomas F. Morgan, Esquire, District Attorney of Clearfield County, and F. Cortez Bell, III, Esquire, Assistant District Attorney of Clearfield County, and respectfully answers the Amendment to the Petition for Writ of Habeas Corpus as follows:

I. Procedural History of Case

The procedural history of the case as set forth in the original Answer to Petition for Writ of Habeas Corpus previously filed in the instant matter is hereby incorporated by reference as if the same were set forth fully herein.

II. Factual History of Case

The factual history of the case as set forth in the original Answer to Petition for Writ of Habeas Corpus previously filed in the instant matter is hereby incorporated by reference as if the same were set forth fully herein.

III. Answer

The responses and averments set forth in Section III of the original Answer to Petition for Writ of Habeas Corpus previously filed in the instant matter are hereby incorporated by reference as if the same were set forth fully herein.

The Respondents would initially aver that Petitioner's filing of his Habeas Corpus Petition at this late date has

sufficiently prejudiced the Respondents in their ability to respond to the Petition. It would be further averred that Petitioner had knowledge of the grounds upon which said Petition could have been filed prior to the date of the instant Petition's filing. The Respondents would aver that they are prejudiced in responding to the allegations of the Petition, in that witnesses who either testified at trial or participated in the investigation of the case have either died, or their whereabouts are currently unknown. Respondents' averment is based upon Rule 9 (a) of the Rules governing Section 2254 cases in the United States District Court. Respondents would reserve the right to assert that the instant Petition is therefore not properly before this Court and by filing the instant Answer would not waive our right to assert such a claim at a later point.

The Respondents would respectfully answer the Amendment to Petition for Writ of Habeas Corpus as follows:

12-D. Paragraph 12-D, as well as every one of its sub-paragraphs 1-4 (a-f) of the Amendment to the Petition are denied. Since every sub-paragraph develops a separate issue, in and of itself, the Respondents shall answer each one individually below. At the outset, Respondents would aver that the issues raised in Petitioner's 12-D, asserting denial of effective assistance of counsel at all phases of litigation including pretrial procedures, the trials of the case, post-trial procedures and appeals, were never raised in any post-trial motions, post-trial briefs or arguments before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented to any State court for the purpose of review. Respondents would aver that the Petitioner, as to said issue, has failed to exhaust the remedies available

in the courts of the Commonwealth of Pennsylvania or to establish that the State remedies are unavailable or ineffective as required by 28 U.S.C. §2254 (b and c). The issue is not properly before this Honorable Court and should therefore be dismissed. The Respondents, by answering the allegations relating to this issue, reserve their right to assert that the issue is not properly before this Court, it having never been presented to the State Courts for review and ruling.

12-D (1). Paragraph 12-D (1) of the Amended Petition is denied. The issue as to whether or not defense counsel provided the Petitioner with adequate and competent representation was never raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been asserted before the courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering this issue within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review. Petitioner alleges generally that defense counsel did not provide adequate and competent representation. Respondents would deny this allegation and aver that defense counsel, as evidenced by the record before this Court for review, did in fact provide Petitioner with adequate and competent representation.

12-D (2). Paragraph 12-D (2) of the Amended Petition is denied. The issue as to whether defense counsel provided the standard of adequacy of legal services that in the exercise of the customary skill and knowledge which normally prevailed at the time and place has never been raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania.

nia nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented before the Courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review. Petitioner alleges generally that defense counsel did not provide that standard of adequacy of legal representation that in the exercise of the customary skill and knowledge which normally prevailed at the time and place may be deemed to be sufficient. Respondents would deny this allegation and aver that defense counsel did in fact provide Petitioner with legal representation which in the exercise of customary skill and knowledge which prevailed at that time and place was adequate, proper and sufficient.

12-D (3). Paragraph 12-D (3) of the Amended Petition is denied. The issue as to whether defense counsel provided the Petitioner with effective assistance of counsel under the Sixth and Fourteenth Amendments of the Constitution of the United States has never been raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented before the courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review. Petitioner alleges generally that defense counsel failed to provide effective assistance of counsel as called for by the Sixth and Fourteenth Amendments of the Constitution of the United States. Respondents would deny this allegation and aver that defense counsel did in fact provide Petitioner with ef-

fective assistance of counsel as provided under the Sixth and Fourteenth Amendments of the Constitution of the United States.

12-D (4a). Paragraph 12-D (4a), as well as every one of its sub-paragraphs (i-vii) of the Amended Petition are denied. Since every sub-paragraph develops a separate allegation, in and of itself, the Respondent shall answer each one individually below. The allegation that defense counsel did not provide adequate and competent representation to Petitioner by not providing the necessary investigation and preparation for the change of venue motions has never been raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented before the courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review. Petitioner alleges that defense counsel failed to provide adequate and competent representation to Petitioner by not providing the necessary investigation and preparation for the change of venue motions. Respondents would deny this allegation and aver that the defense counsel did competently research and prepare all necessary change of venue motions. Respondents would demand strict proof of Petitioner's allegations as to the failure of defense counsel to investigate and prepare for the change of venue motions, if this matter proceeds to a hearing on the merits of the allegation.

12-D (4a, i). Paragraph 12-D (4a, i) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for

review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that Clearfield County was "inundated" with publicity concerning the State proceeding. It would be averred that although there was coverage by the newspaper and radio, such was not of the nature so as to deny the Petitioner any of his rights to a fair trial or a fair jury. It would be denied that defense counsel was in any way incompetent by failing to introduce into evidence any other evidence other than that which is already of record. Counsel for Respondents does not have copies of those items which were introduced in support of each motion for change of venue and would demand strict proof of the allegation contained in paragraph 12-D (4a, i) if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4a, ii). Paragraph 12-D (4a, ii) of the Amended Petition is denied. As indicated above, the issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that any newspaper publicity afforded to the State proceedings of Petitioner's case resulted in public prejudice against him. It would be further denied that Petitioner, as a result of such coverage, was denied his right to empanel a fair and impartial jury or to a fair trial. It would be further denied that defense counsel was in any way ineffective by failing to produce all such newspaper evidence during the change of venue motions. Respondents would demand strict proof of Petitioner's allegation contained at Paragraph 12-D (4a, ii) if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4a, iii). Paragraph 12-D (4a, iii) of the Amended Petition is denied. As indicated above, this issue has never been presented by the Petitioner to the State courts for review. Respondents, by answering this allegation, reserve their right to assert that the issue is not properly before this Court, it having not been asserted previously. Respondents would aver that the Motions for Change of Venue, the allegations therein, as well as the affidavits in support thereof were complete such that there is no evidence of an inadequate investigation and preparation thereby indicating that defense counsel was ineffective and not competent. Respondents would demand strict proof of the allegations contained in 12-D (4a, iii) if this matter proceeds to hearing on the merits of Petitioner's claims.

12-D (4a, iv). Paragraph 12-D (4a, iv) of the Amended Petition is denied. As indicated above, this issue has never been presented by the Petitioner to the State courts for review. Respondents, by answering this allegation, reserve their right to assert that the issue is not properly before this Court, it not having been asserted previously. Respondents would admit that on September 21, 1970 the Honorable John A. Cherry did issue an Order denying Petitioner's request for a change of venue. Respondents would deny, however, that such Order was issued due to any incompetent and improper presentation of evidence by defense counsel such that Petitioner was denied his right to effective representation. Respondents would demand strict proof of the allegations contained in 12-D (4a, iv) if this matter proceeds to hearing on the merits of Petitioner's claims.

12-D (4a, v). Paragraph 12-D (4a, v) of the Amended Petition is denied. As indicated above, this issue

has never been presented by the Petitioner to the State courts for review. Respondents, by answering this allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the affidavit filed November 7, 1970 was incomplete or that it was of such condition that it demonstrated that defense counsel had not done the necessary investigation and preparation for the change of venue motion. Respondents would demand strict proof as to Petitioner's allegation contained in Paragraph 12-D (4a, v) if this matter proceeds to hearing on the merits of Petitioner's claims.

12-D (4a, vi). Paragraph 12-D (4a, vi) of the Amended Petition is denied. As indicated above, this issue has never been presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny the allegation that defense counsel did not submit to the Court in support of change of venue motions evidence from radio, television and magazine and therefore was ineffective. Respondents would aver, for example, that the record establishes that defense counsel did introduce evidence as to radio publicity as found in the transcript "On motion to suppress evidence and motion for change of venue" taken June 4, 1970. Pages 46 through 70 of the transcript deal specifically with one incident of radio coverage. Respondents would demand strict proof of the allegation contained in Paragraph 12-D (4a, vi) if the matter proceeds to hearing on the merits of Petitioner's claims.

12-D (4a, vii). Paragraph 12-D (4a, vii) of the Amended Petition may be neither affirmed nor denied by

the Respondents as there is not an allegation contained in said paragraph.

12-D (4b). Paragraph 12-D (4b), as well as every one of its sub-paragraphs (i-vii) of the Amended Petition are denied. Since every sub-paragraph develops a separate allegation, in and of itself, the Respondent shall answer each one individually below. The allegation that defense counsel did not provide effective assistance of counsel in the investigation, preparation and representation of the Petitioner at the voir dire proceedings of prospective jurors before the Honorable John A. Cherry that commenced on November 4, 1970 has never been raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented before the courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review. Petitioner alleges that defense counsel did not provide effective assistance of counsel at the voir dire proceedings for the second trial. Respondents would deny this allegation and aver that defense counsel did in fact provide adequate representation of Petitioner at all stages of proceedings in this case. Respondents would demand strict proof of Petitioner's allegation contained in Paragraph 12-D (4b) of the Amended Petition if this matter proceeds to a hearing on the merits of the allegation.

12-D (4b, i). Paragraph 12-D (4b, i) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve

their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that permitting the Petitioner to be referred to as "prisoner" during jury selection evidenced ineffective representation of counsel. Respondents would demand strict proof of the allegation made in Paragraph 12-D (4b, i) if the matter proceeds to hearing on the merits of Petitioner's claims.

12-D (4b, ii). Paragraph 12-D (4b, ii) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that defense counsel was ineffective in any manner with regard to the questioning of jurors on voir dire. In specific, it would be denied that defense counsel did not adequately question the jurors with regard to their exposure as to publicity of the case as well as to whether they had established any opinions as a result thereof. Respondents would demand strict proof of the allegations contained in Paragraph 12-D (4b, ii) if the matter proceeds to hearing on the merits of Petitioner's claims.

12-D (4b, iii). Paragraph 12-D (4b, iii) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny Petitioner's allegation that defense counsel was ineffective due to his failure to question various jury panel members regarding whether they had any connection to law enforcement officials. Respondents

would aver that in the majority of cases such a question was not necessary due to the responses from the witnesses which had already been given. Respondents would demand strict proof of the allegation contained in Paragraph 12-D (4b, iii) as well as that such an allegation establishes ineffective counsel or that Petitioner was denied a fair trial by his actions, if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4b, iv). Paragraph 12-D (4b, iv) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been presented previously. Respondents would deny the allegation that defense counsel was ineffective and failed to provide Petitioner with proper representation by making challenges for cause in front of the witnesses from the jury panel. Respondents would aver that of the twelve people who were ultimately selected for the jury, nine of such persons were accepted by both sides without challenges for cause or challenges of any form being exercised. Respondents would demand strict proof of the allegation contained in Paragraph 12-D (4b, iv) as well as that such an allegation establishes that defense counsel was ineffective or that Petitioner was denied a fair trial by his actions, if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4b, v). Paragraph 12-D (4b, v) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve the right to assert that this issue is not properly before this Court, it not having been presented previously.

Respondents would deny the allegation that because defense counsel did not make challenges for cause as to each of the jurors he may be deemed to be ineffective counsel. Respondents would demand strict proof of the allegation contained in Paragraph 12-D (4b, v), as well as that such an allegation establishes that defense counsel was ineffective or that Petitioner was denied a fair trial by his actions, if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4b, vi). Paragraph 12-D (4b, vi) of the Amended Petition is denied. As indicated above, this issue has never been presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve the right to assert that this issue is not properly before this Court, it not having been presented previously. Respondents would deny that defense counsel exhibited inadequate investigation, preparation and questioning of jurors such that he could not properly renew a Motion for Change of Venue. Respondents would demand strict proof of the allegation contained in Paragraph 12-D (4b, vi), as well as that such conduct establishes defense counsel's ineffectiveness, if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4b, vii). Paragraph 12-D (4b, vii) of the Amended Petition is denied. As indicated above, this issue has never been presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve the right to assert that this issue is not properly before this Court, it not having been presented previously. Respondents may not specifically deny or affirm the contents of Paragraph 12-D (4b, vii) as there is no specific allegation made therein. Respondents would deny that defense counsel was ineffective as well as that such ineffec-

tiveness resulted in the denial of a fair trial or in the improper presentation of a renewed change of venue motion. Strict proof thereof would be demanded at hearing in the instant matter if the Court deems that a hearing on Petitioner's claim is necessary.

12-D (4c). Paragraph 12-D (4c) as well as its sub-paragraphs (i-iii) of the Amended Petition are denied. Since every sub-paragraph develops a separate allegation, in and of itself, the Respondent shall answer each one individually below. The allegation that defense counsel did not provide effective assistance of counsel by not requiring all court proceedings to be recorded and transcribed has never been raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented before the courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review. The allegation that defense counsel did not provide effective assistance of counsel by not requiring all Court proceedings to be recorded and transcribed would be denied. Respondents would demand strict proof, if a hearing on Petitioner's claims is held, that such proceeding should have been recorded and transcribed and that the failure of defense counsel to obtain such establishes ineffective assistance of trial counsel as well as denying the Petitioner of his right to a fair trial.

12-D (4c, i). Paragraph 12-D (4c, i) of the Amended Petition is admitted in part and denied in part. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by an-

swering the allegation reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would admit that various portions of proceedings dealing with legal argument of counsel did not appear within the transcribed record provided to the Petitioner. Respondents would deny that any unreported or untranscribed portions of the proceeding occurred at page 255 of the transcript. It would be admitted that page 254 of the transcript does in fact contain a transcript of defense counsel's argument at side bar. It would be specifically denied that such omissions from the recorded and transcribed record establish that defense counsel was ineffective or that as a result thereof any of Petitioner's rights were violated or he was denied a fair trial. Strict proof of the allegations made in Paragraph 12-D (4c, i), as well as that such establish ineffectiveness of counsel would be demanded by the Respondents if a hearing is held on the merits of Petitioner's claim.

12-D (4c, ii). Paragraph 12-D (4c, ii) of the Amended Petition is admitted in part and denied in part. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would admit that the record of voir dire does evidence the quotations as set forth in Petitioner's Paragraph 12-D (4c, ii). Respondents would specifically deny that such allegations as stated in 12-D (4c, ii) establish that defense counsel was in any way ineffective or that as a result thereof any of Petitioner's rights were violated or he was denied a fair trial. Strict proof of the allegations made in Paragraph 12-D (4c, ii), as well as that such establish ineffectiveness of counsel, would be de-

manded by the Respondents if a hearing is held on the merits of Petitioner's claim.

12-D (4c, iii). Paragraph 12-D (4c, iii) of the Amended Petition would be admitted in part and denied in part. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. While Respondents would admit that the record as transcribed does not contain any legal arguments of counsel occurring on or about November 13-14, 1970, it would be specifically denied by Respondents that the venue issue was raised by the Court. Respondents would aver that such motion for change of venue was once again asserted by defense counsel. Respondents would deny that such allegations as stated in 12-D (4c, iii) establish that defense counsel was in any way ineffective or that as a result thereof any of Petitioner's rights were violated or he was denied a fair trial. Strict proof of the allegations made in Paragraph 12-D (4c, iii), as well as that such establish ineffectiveness of counsel, would be demanded by the Respondents if a hearing is held on the merits of Petitioner's claim.

12-D (4c, iv). Paragraph 12-D (4c, iv) of the Amended Petition may be neither affirmed nor denied by the Respondents as there is no allegation contained therein. Respondents would have no objection to the request made by the Petitioner as set forth in Paragraph 12-D (4c, iv).

12-D (4d). Paragraph 12-D (4d) as well as its sub-paragraphs (i-iii) of the Amended Petition are denied. Since every sub-paragraph develops a separate allegation, in and of itself, the Respondent shall answer each one individually below. The allegation that defense counsel did

not provide effective assistance of counsel in regard to the sequestration of witnesses during the trial has never been raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented before the courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve the right to assert that the issue is not properly before the Court for review, it not having been asserted previously. Petitioner alleges that defense counsel did not provide effective assistance of counsel in regard to the sequestration of witnesses during trial. Respondents would deny this allegation and aver that even though defense counsel did fail to sequester witnesses in various proceedings, such is not sufficient to support a claim that counsel was ineffective or to establish that any rights of Petitioner or his right to a fair trial was denied. Respondents would demand strict proof of the allegation contained in Paragraph 12-D (4d), as well as that such conduct establishes defense counsel's ineffectiveness or that Petitioner was denied his right to a fair trial by his actions, if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4d, i). Paragraph 12-D (4d, i) of the Amended Petition would be admitted in part and denied in part. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering the allegation, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would admit that defense counsel did not request sequestration at the first trial nor at the suppression hearing. It would be averred

that such a request was made at the second trial. Respondents would deny that the fact that witnesses were not sequestered at previous proceedings evidences that defense counsel was ineffective or that Petitioner was denied his right to a fair trial. Respondents would demand strict proof of Petitioner's allegations contained in Paragraph 12-D (4d, i) if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4d, ii). Paragraph 12-D (4d, ii) of the Amended Petition is denied. As indicated above, this issue has never been presented by the Petitioner to the State courts for review. Respondents, by answering this allegation, reserve their right to assert that the issue is not properly before this Court, it not having been asserted previously. Respondents would deny the allegation that defense counsel failed to provide a proper motion, reasons and legal authorities to support the motion. Respondents would demand strict proof of the allegations contained in 12-D (4d, ii) if this matter proceeds to hearing on the merits of Petitioner's claims.

12-D (4d, iii). Paragraph 12-D (4d, iii) of the Amended Petition can be neither affirmed or denied by the Respondents as there is no allegation contained therein. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously.

12-D (4e). Paragraph 12-D (4e), as well as every one of its sub-paragraphs (i-iv) of the Amended Petition are denied. Since every sub-paragraph develops a separate allegation, in and of itself, the Respondent shall answer

each one individually below. The allegation that defense counsel did not provide effective assistance of counsel by objecting to the bias and prejudice of the trial court in requesting that the trial court ~~recuse~~ himself from the case and in raising these issues on appeal has never been raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented before the courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review. Respondents would deny that defense counsel was ineffective by failing to allege that the trial court was biased or prejudiced or seeking recusal of the trial judge. It would be further denied that the trial court was in any way biased or prejudiced toward the Petitioner and that as a result thereof he was denied his right to a fair jury and trial. Respondents would demand strict proof of Petitioner's allegations contained in Paragraph 12-D (4e), as well as that such establishes ineffective counsel such that Petitioner was denied his rights in any manner.

12-D (4e, i). Paragraph 12-D (4e, i) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for review. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review, it not having been asserted previously. Respondents would deny that the trial court in denying the Motions for Change of Venue acted in any manner which exhibited bias or prejudice. It would be specifically de-

nied that the trial court was biased or prejudiced in any way against the Petitioner and that defense counsel was in any manner ineffective for failing to assert such a claim. Respondents would demand strict proof of the allegation contained in 12-D (4e, i), as well as a showing that trial counsel was ineffective in not asserting a claim of bias and prejudice before the lower court and on appeal and that Petitioner was denied a fair trial thereby, if hearing is held on the merits of Petitioner's claim.

12-D (4e, ii). Paragraph 12-D (4e, ii) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for review. The Respondents, therefore, by answering this allegation within the Amended Petition, would reserve their right to assert that the issue is not properly before this Court for review, it not having been asserted previously. Respondents would deny that the trial court exhibited any bias or prejudice with regard to the voir dire proceeding, rulings, change of venue motion and final stages of jury selection. Likewise, it would be denied that defense counsel was ineffective for failing to assert any claims or objections based upon the above assertions. Respondents would aver that the trial court's questioning during voir dire, its rulings and conduct during the complete voir dire, was in fact proper. Respondents would demand strict proof of the allegations contained in 12-D (4e, ii), if hearing is held thereon, as well as proof that defense counsel by not raising a claim or objection was ineffective counsel such that the rights of the Petitioner were violated.

12-D (4e, iii). Paragraph 12-D (4e, iii) of the Amended Petition is denied. As indicated above, this issue was never presented by the Petitioner to the State courts for review. The Respondents, therefore, by answering this

allegation within the Amended Petition, would reserve their right to assert that the issue is not properly before this Court for review, it not having been asserted previously. Respondents would deny that the trial court during the course of trial in rulings, questions or arguments with defense counsel exhibited any conduct such as would show bias or prejudice toward the Petitioner or which would result in the denial of any of his rights. Likewise, it would be denied that defense counsel was ineffective in any way for not asserting such a claim by objection or on appeal. Respondents would demand strict proof of Petitioner's allegations set forth in paragraph 12-D (4e, iii), as well as that defense counsel was ineffective by not asserting a claim thereon.

12-D (4e, iv). Paragraph 12-D (4e, iv) of the Amended Petition can be neither affirmed nor denied by the Respondents as there is no allegation contained therein. As indicated above, this issue was never presented by the Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would generally deny that the trial court was biased or prejudiced in any way; that defense counsel was ineffective for failure to assert such a claim; and that Petitioner as a result of the Court's and counsel's actions was denied his rights with regard to a fair trial and a fair jury. Respondents would demand strict proof thereof if hearing is held on the merits of Petitioner's claim.

12-D (4f). Paragraph 12-D (4f), as well as every one of its sub-paragraphs (i-xx) of the Amended Petition are denied. Since every sub-paragraph develops a separate allegation, in and of itself, the Respondent shall answer

each one individually below. The allegations that defense counsel did not provide effective assistance of counsel in the various respects listed specifically in sub-paragraphs (i-xx) has never been raised in defense post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been presented before the courts of the Commonwealth of Pennsylvania. The Respondents, therefore, by answering these allegations within the Amended Petition, would reserve the right to assert that the issue is not properly before this Court for review, it not having been previously asserted. Respondents would deny that defense counsel was ineffective with regard to these areas set forth in sub-paragraphs (i-xx). Strict proof thereof would be demanded if hearing on the merits of Petitioner's claim is held.

12-D (4f, i). Paragraph 12-D (4f, i) of the Amended Petition is denied. As indicated above, this issue was never presented by Petition to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny the allegation that defense counsel was ineffective for failing to object to alleged erroneous rulings of the trial court during voir dire. Respondents would aver that the rulings of the trial court during voir dire were in fact proper and that defense counsel was not ineffective for failing to raise objections thereto. Respondents, if the instant matter proceeds to hearing, would demand strict proof of the allegations made in Paragraph 12-D (4f, i), as well as that defense counsel was ineffective for failure to raise an objection and that Petitioner was denied his rights to a fair trial and jury by counsel's actions.

12-D (4f, ii) . Paragraph 12-D (4f, ii) of the Amended Petition is denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would specifically deny that the trial court made erroneous rulings during the course of the trial. It would be further denied that trial counsel was ineffective for failing to raise objections to such alleged erroneous rulings. Respondents would demand specific proof of such allegations as well as that the failure of defense counsel to object exhibited ineffective assistance of counsel such that the Petitioner was denied his Constitutional rights.

12-D (4f, iii) . Paragraph 12-D (4f, iii) of the Amended Petition is denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents are not personally aware as to what defense counsel did or did not advise the Petitioner regarding the trial. It would be specifically denied, however, that failure of defense counsel to advise Petitioner as to the relevancy and purpose of evidence constituted ineffective representation of counsel such that Petitioner was denied any of his Constitutional rights. Strict proof thereof would be demanded by the Respondents if this matter proceeds to the point of a hearing on the merits of Petitioner's claim.

12-D (4f, iv) . Paragraph 12-D (4f, iv) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this para-

graph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that defense counsel was ineffective by failing to present expert testimony from a pathologist or forensic pathologist. Respondents would aver that at the first trial of Petitioner such an expert was called to testify. Defense counsel did have an expert examine the Commonwealth evidence. It would be denied that defense counsel was ineffective for failing to call such a witness to testify at the second trial of Petitioner. Respondents would demand strict proof of the allegations contained in Paragraph 12-D (4f, iv), as well as that such if established shows that defense counsel was ineffective such that Petitioner's Constitutional rights were violated.

12-D (4f, v). Paragraph 12-D (4f, v) of the Amended Petition is denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that defense counsel conducted himself throughout trial in such a manner as to result in Petitioner being denied effective assistance of counsel or being denied any of his Constitutional rights. Respondents would specifically deny that defense counsel did not properly represent Petitioner during the course of trial. Strict proof of the allegations made in Paragraph 12-D (4f, v) would be demanded by the Respondents if the instant matter proceeds to hearing on Petitioner's claims.

12-D (4f, vi). Paragraph 12-D (4f, vi) of the Amended Petition is denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve

their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that defense counsel may be deemed to have been ineffective for advising Petitioner not to testify at trial because of the possibility that suppressed evidence might then become admissible. Respondents have no personal knowledge as to exactly what defense counsel did or did not advise Petitioner. Strict proof of the allegations contained in Paragraph 12-D (4f, vi), as well as that such establish defense counsel's ineffectiveness and that such resulted in Petitioner's Constitutional rights being violated would be demanded by Respondents if this matter proceeds to hearing on Petitioner's claim.

12-D (4f, vii). Paragraph 12-D (4f, vii) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the trial court gave erroneous instructions. Likewise, Respondents would deny that defense counsel was ineffective by failing to raise objection to such alleged erroneous instructions. Respondents would aver that the instructions given by the trial court were in fact proper. Respondents would demand strict proof of Petitioner's allegations contained in Paragraph 12-D (4f, vii), as well as that such establish that defense counsel was ineffective or that Petitioner was denied his Constitutional rights as a result thereof.

12-D (4f, viii). Paragraph 12-D (4f, viii) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this para-

graph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the trial court's charge on evidence of good character and reputation was erroneous. Respondents would further deny that defense counsel was ineffective by failing to object to such allegedly erroneous instructions, as well as that such failure to object establishes that Petitioner was denied any of his Constitutional rights as a result thereof. Respondents would demand strict proof, if the matter proceeds to hearing, as to the allegations made in Paragraph 12-D (4f, viii), as well as to the assertion that such establishes that defense counsel was ineffective and that Petitioner was denied his Constitutional rights as a result thereof.

12-D (4f, ix). Paragraph 12-D (4f, ix) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the trial court erred in any regard with regard to the instructions to the jury. It would be specifically denied that the trial court erred in its instructions with regard to murder of the first degree as it related to other offenses. Respondents would further deny that defense counsel was ineffective by failing to object to the Court's charge regarding murder of the first degree as it related to other offenses. Strict proof of the allegations made in Paragraph 12-D (4f, ix), as well as that such establishes defense counsel's ineffectiveness and thereby denied Petitioner his Constitutional rights, would be demanded by Respondents if the matter proceeds to hearing on the merits of Petitioner's claim.

12-D (4f, x) . Paragraph 12-D (4f, x) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the trial Court committed error in its explanation to the jury of the possible verdicts which indicated the penalties prescribed by law in cases of first degree murder convictions. It would be further denied that the Court's comment, that indicating that the death penalty could not be imposed in this case, was in error. It would be specifically denied that the Court at any point indicated to the jury that they were to be concerned only with the penalties of either "life" or "death". Respondents would deny that defense counsel was ineffective by failing to object to such instructions by the Court, as well as it would be denied that Petitioner was denied his rights as a result of defense counsel's failure to object. Respondents would demand strict proof of the allegations contained in Paragraph 12-D (4f, x) , as well as the assertion that defense counsel was ineffective by failing to object and that Petitioner was thereby denied of his Constitutional rights as a result of counsel's acts.

12-D (4f, xi) . Paragraph 12-D (4f, xi) of the Amended Petition would be denied. As indicated above, this was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the trial court erred with regard to an instruction that the person is presumed to intend the natural and probable consequences of his act. Likewise, it

would be denied that defense counsel was ineffective for failing to object to such an instruction or that Petitioner's rights were violated in any way by defense counsel's actions. Respondents would aver that the instruction given by the trial court was proper. Respondents would demand strict proof of the allegation made in Paragraph 12-D (4f, xi), as well as that such establishes defense counsel's ineffectiveness and that Petitioner's rights were violated as a result thereof.

12-D (4f, xii). Paragraph 12-D (4f, xii) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the trial court erred with regard to an instruction that the intentional, unlawful and fatal use of a deadly weapon against a vital part of the body gives rise to the presumption that malice and intent to kill existed. Respondents would further deny that defense counsel was ineffective for failing to object thereto or that Petitioner was denied any rights as a result of defense counsel's actions. Respondents would aver that the trial court's instruction was a proper statement and instruction. Respondents would demand strict proof if the matter goes to hearing of the allegations made in Paragraph 12-D (4f, xii), as well as that defense counsel was ineffective by failing to object to the instruction and that Petitioner's rights were thereby violated.

12-D (4f, xiii). Paragraph 12-D (4f, xiii) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this para-

graph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the trial court erred with regard to its instruction in any regard. It would be specifically denied that the trial court instructed the jury that Petitioner's evidence of good character and reputation could not be applied to rebut malice and/or intent. Respondents would aver that the trial court did not give such an instruction and thus defense counsel cannot be claimed or deemed to have been ineffective for his failure to object. Respondents would demand strict proof of the allegation made in Paragraph 12-D (4f, xiii), as well as that defense counsel was ineffective by failing to object and that Petitioner was denied of any right as a result of counsel's actions.

12-D (4f, xiv). Paragraph 12-D (4f, xiv) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny the allegation that the trial court committed any error with regard to instructions to the jury. Respondents would further deny the allegation that defense counsel was ineffective in any regard by failing to object to the Court's charge concerning a possible verdict of voluntary manslaughter and that Petitioner's rights were violated in any way by defense counsel's acts. Respondents would aver that both counsel argued voluntary manslaughter to the jury during closing argument. Defense counsel did properly place those objections he did have with regard to the voluntary manslaughter instruction on the record. Respondents would demand strict proof at

hearing of the allegations made in Paragraph 12-D (4f, xiv), as well as that such establishes defense counsel's ineffectiveness and Petitioner's Constitutional rights were denied as a result of such acts.

12-D (4f, xv). Paragraph 12-D (4f, xv) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that the trial court erred in any manner with regard to its instructions to the jury. It would be specifically denied that the trial court erred with regard to its instruction on provocation or with regard to any instructions given or the lack thereof on "legally adequate" or "sufficient" provocation to warrant a verdict of voluntary manslaughter. Respondents would deny that defense counsel was ineffective for failing to object to the court's instructions in this regard, as well as to the assertion that Petitioner's rights were violated by defense counsel's action or the Court. Respondents would demand strict proof at hearing, if one is held, as to the allegation contained in Paragraph 12-D (4f, xv), ~~as well as to defense counsel's ineffectiveness by not objecting and the denial of Petitioner's rights by defense counsel's actions and by the Court.~~

12-D (4f, xvi). Paragraph 12-D (4f, xvi) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that trial counsel failed

to object to the trial court's instruction regarding that there was no evidence presented to reduce or mitigate malice such that murder might be reduced to manslaughter. Respondents would aver that defense counsel entered a specific exemption on record in this regard and as such, he cannot be deemed to be ineffective for failing to object. Respondents would specifically deny that defense counsel was ineffective in this regard or that Petitioner was denied any Constitutional rights as a result of defense counsel's actions. Respondents would demand strict proof, if a hearing is held, as to the allegations made in Paragraph 12-D (4f, xvi), as well as the assertion that defense counsel is thereby ineffective and that Petitioner's rights were violated as a result of counsel's actions.

12-D (4f, xvii). Paragraph 12-D (4f, xvii) of the Amended Petition would be denied to the extent stated. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Although Petitioner does not state specifically what instructions the allegations refer to, the Respondents would deny that the Court erred with regard to its charge on Petitioner's testimony of good reputation. Likewise, Respondents would deny that defense counsel was in any manner ineffective by not objecting to such charge as well as deny that Petitioner's rights were in any way violated by his defense counsel's actions. Respondents would, if hearing is held, demand strict proof as to the allegation made in Paragraph 12-D (4f, xvii), as well as the assertion that defense counsel was ineffective by failing to raise an objection and that Petitioner's Constitutional rights were violated thereby.

12-D (4f, xviii). Paragraph 12-D (4f, xviii) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny the allegation as stated. Respondents would aver that the exact language of the Court was: "All of the Commonwealth's Points for Charge are affirmed but will not be read because covered by the main charge. All of the Points for Charge of the defendant are refused and, of course, will not be read." Respondents would deny that the trial court's statement was in error or improperly made. It would be further denied that defense counsel was ineffective for not objecting to the statement as set forth above. It is also denied that Petitioner's rights were in any way violated by defense counsel's conduct or the statement of the Court. Respondents would demand at hearing strict proof of the allegations made in Paragraph 12-D (4f, xviii), as well as the assertion that defense counsel was ineffective due to his failure to object and that Petitioner's Constitutional rights were violated thereby.

12-D (4f, xix). Paragraph 12-D (4f, xix) of the Amended Petition would be denied. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would admit that defense counsel for Petitioner did not object to the Commonwealth's closing until the conclusion thereof. It would be denied, however, that such action

by defense counsel evidences that counsel was in any manner ineffective and that Petitioner's Constitutional rights were in any way violated by the Commonwealth's closing argument or defense counsel's actions. Respondents would demand strict proof at hearing, if one is held, of the allegations made in Paragraph 12-D(4f, xix), as well as the assertion that defense counsel was ineffective and that Petitioner's rights were violated thereby.

12-D(4f, xx). Paragraph 12-D(4f, xx) of the Amended Petition would be denied to the extent stated. As indicated above, this issue was never presented by Petitioner to the State courts for review. Respondents, by answering this paragraph, reserve their right to assert that this issue is not properly before this Court, it not having been asserted previously. Respondents would deny that defense counsel was in any way incompetent and ineffective. Respondents would further deny that Petitioner's Constitutional rights were violated in any manner by defense counsel's actions.

15. Paragraph 15 of the Amended Petition would be admitted only to the extent stated.

WHEREFORE, the Respondents respectfully request that the Petition for Writ of Habeas Corpus filed to Civil Action No. 81-234 be dismissed and Certificate of Probable Cause be denied. With respect to Paragraph 12-D, as well as every one of its subparagraphs 1-4(a-f) of the Amendment to the Petition for Writ of Habeas Corpus, the Respondents would respectfully request that the Court find that such allegations dealing with ineffective counsel were never asserted in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of

Pennsylvania nor by Petition under the Post Conviction Hearing Act. As such, the issue has never been asserted before the courts of the Commonwealth of Pennsylvania. Respondents would aver that Petitioner, as to said issues, has failed to exhaust the remedies available to him in the courts of the Commonwealth of Pennsylvania or to establish that the State remedies are unavailable or ineffective as required by 28 U.S.C. §2254(b & c). The issues are not properly before this Honorable Court and should therefore be dismissed.

Numerous cases within the Federal Court system uphold and embody this same principle that before a state prisoner may seek Federal Court review, he must first present any and all claims to the highest court or the State. *Preiser vs. Rodrigues*, 411 U.S. 475 (1973); *Braden vs. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *United States ex rel. Trontino vs. Hatrack*, 563 F.2d 86 (3d Cir. 1977).

Respondents would further assert that Petitioner, by filing his Habeas Corpus Petition at this late date, has significantly prejudiced the Respondents in their ability to respond to the Petition. It would be further alleged that Petitioner had knowledge of the grounds on which said Petition could have been filed prior to the date of the instant Petition's filing. Therefore, it is Respondent's contention that the Petitioner's claims in the Habeas Corpus Petition and Amendment thereto are either without merit, are sufficiently delayed in assertion such that Respondents cannot competently reply or that the Petitioner has failed to exhaust the remedies available to him in the Commonwealth of Pennsylvania.

It would be respectfully requested that the Petition of Jon E. Yount for Writ of Habeas Corpus and the Amendment thereto be dismissed and that Certificate of Probable Cause be denied.

Respectfully submitted,

(s) F. Cortez Bell, III

F. Cortez Bell, III

Assistant District Attorney

[Certificate of Service Omitted]

PETITION TO DISMISS PETITION FOR
WRIT OF HABEAS CORPUS
[Caption Omitted]

AND NOW, comes the Respondents, Superintendent Patton and the Commonwealth of Pennsylvania by Thomas F. Morgan, Esquire, District Attorney of Clearfield County, and F. Cortez Bell, III, Esquire, Assistant District Attorney of Clearfield County, and respectfully petitions for the dismissal of the Writ of Habeas Corpus filed to the above captioned term and number as follows:

1. Petition for Writ of Habeas Corpus was filed pro se by the Petitioner Jon E. Yount.

2. The Respondents filed an Answer to the Petitioner's pro se petition on or about March 24, 1981.

3. The office of the Federal Public Defender was appointed to represent the Petitioner on or about April 16, 1981. That the office of the Federal Public Defender through George E. Schumacher filed an Amended Petition for Writ of Habeas Corpus on behalf of the Petitioner which was filed on or about July 1, 1981.

4. That the respondents filed an Answer to the Amended Petition for Writ of Habeas Corpus on or about August 14, 1981.

5. That said Petitions for Writ of Habeas Corpus present issues which have never been raised in defense post-trial motions, post-trial briefs, by brief or argument before the Supreme Court of Pennsylvania, nor by Petition under the Post Conviction Hearing Act. As such, the issues have never been presented before the

*Petition To Dismiss Petition
for Writ of Habeas Corpus*

Courts of the Commonwealth of Pennsylvania. In specific, the issues raised in Petitioner's paragraphs 12-C(a), 12-C(b), 12-C(c), 12-C(d), 12-C(e) — that portion dealing with the use of evidence of good character and reputation in relation to malice that was not part of the specific objections raised at trial — 12-C(f), 12-D, as well as every one of its sub-paragraphs 1-4(a-f) of the Amended Petition. With regard to the above listed paragraphs and in specific with regard to the allegations concerning the ineffective assistance of counsel, none of the issues were raised before the Courts of the Commonwealth of Pennsylvania such that those Courts might have the opportunity to review the issues presented therein.

6. That the Respondents are significantly prejudiced in their ability to respond to the allegations of said Habeas Corpus Petition, in that the Petitioner delayed the filing of the Petition even though the grounds upon which the Petition is based were within the Petitioner's knowledge at an earlier date.

WHEREFORE, the Respondents would respectfully request that the Court dismiss the Petition for Writ of Habeas Corpus and the amendment thereto and deny the issuance of a Writ of Probable Cause, or in the alternative, that the Court dismiss the Petition and the Amendment thereto with regard to those issues raised above which the Petitioner has not previously asserted before the Courts of the Commonwealth of Pennsylvania.

Respectfully submitted,

(s) F. Cortez Bell, III

F. Cortez Bell, III

Assistant District Attorney

[Affidavit and Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

[Caption Omitted]

Hearing on Petition for
WRIT OF HABEAS CORPUS

United States Courthouse
Pittsburgh, Pennsylvania

November 3, 1981

Before: ROBERT C. MITCHELL, Magistrate

Appearances:

For the Petitioner: George E. Schumacher, ESQ.,
Federal Public Defender, 590 Centre City Tower,
Pittsburgh, PA 15222

For the Respondent: F. Cortez Bell, III, Esq.,
Assistant District Attorney, Clearfield County, P.O.
Box 887, Clearfield, PA 16830

Respondent in person.

[2] PROCEEDINGS

THE COURT: This is the case of Jon E. Yount
versus Harvey Bartle at Civil Action 81-234.

Sir, are you Mr. Yount?

THE RESPONDENT: Yes, sir.

THE COURT: Mr. Yount, you are represented by Mr. Schumacher; is that correct?

THE RESPONDENT: That's right.

THE COURT: Mr. Bell, you are appearing on behalf of the Commonwealth; is that correct?

MR. BELL: Yes, sir.

THE COURT: Mr. Schumacher, do you want to proceed, please?

MR. SCHUMACHER: Your Honor, a petition for writ of habeas corpus was filed pro se by my client, Jon E. Yount, raising several issues that are presented to this Court today, first of which is that his conviction was obtained by a violation of his privilege against self incrimination through the use of oral statements elicited without required Miranda warnings, the issue there being whether or not statements elicited from him were in violation of his constitutional rights or whether they were voluntary statements made by him.

In addition thereto, the second argument that was raised by Petitioner was the fact that his conviction [3] was obtained in violation of his constitutional right to select and impanel a fair and impartial and indifferent petit jury, and that issue primarily presented the fact that publicity in Clearfield County was of such a nature, from the time of his original trial in 1966 up to and including the selection of the jury in the second trial, which occurred in November of 1970, that he was unable to select a fair and impartial jury in Clearfield County.

The matter further raises the issue of whether or not he was unable to obtain a fair and impartial jury because of the voir dire questioning that took place and, indicating the exposure of the jurors to that publicity, the fact that a substantial majority of those jurors expressed fixed opinions of guilt or innocence and in further answers of the Grand Jury, indicating their knowledge about the facts of the case from various sources, including discussions with other individuals.

An additional element complained of by Petitioner is that there was a violation of his constitutional right to a fair and impartial jury as a result of the Trial Court's prejudicial charge to the jury and because of the fact that it included erroneous instructions.

After the Federal Defender was appointed to represent Mr. Yount, a supplemental petition was filed, with leave of the Court, raising the issue of competency of defense [4] counsel that represented Petitioner at the time of the second trial.

All of these issues are before the Court at this time.

THE COURT: Mr. Bell, do you want to be heard before we begin?

MR. BELL: Your Honor, basically, I would note for the Court that the issues, as Mr. Schumacher has stated, are those that were presented in the various petitions. The Commonwealth, at this point, would just reserve the right to object to various of those items as they come up within the hearing, on the basis they were not exhausted before the State Courts.

THE COURT: Okay. Now, I have not received—and, through inquiry, I assume it cannot be obtained—a copy of the petition of Mr. Yount as the Appellant in the Pennsylvania Supreme Court on the second trial, to determine what issues were presented to the Pennsylvania Supreme Court. I do have a copy of the Appellee's brief, which, I assume, just merely states the converse of the question. Basically, it appears to me that, other than the competency of counsel issue, these issues have been raised in the Pennsylvania Supreme Court. This is just my preliminary reactions to the matters raised here, now.

MR. BELL: Your Honor, I have gone through and [5] made a list of the various items. Obviously, the Miranda issue, or the statement he made, was fully raised.

THE COURT: And that was the basis of the original demand; was it not?

MR. BELL: Yes. The second issue, in regard to the impaneling of a fair and impartial jury, that was also raised before the State Court and was exhausted.

The third matter that was raised before the Court was with regard to the jury instructions of the Court, involving evidence on voluntary manslaughter.

THE COURT: Evidence as to what?

MR. BELL: Evidence as to voluntary—that is under Mr. Yount's petition, that is paragraph 12(c), subparagraph E.

As to all the other issues, the incompetent counsel and those items raised in paragraph 12(c), A through F, and also 12(d)—those items have not been asserted

before and, therefore, due to his failure to exhaust the State Court remedies, we would object to presently speaking of.

With regard to 12(c), subparagraph E, which I indicated was fully exhausted, one was fully exhausted as to the voluntary manslaughter; the other, the Court gave instructions as to the use of evidence of good character, and that issue was not raised before the State Courts.

THE COURT: I assume, in your final brief, [6] you will spell this out very carefully, and, again, we will leave the record open, in case anyone can come up with the copy of the Appellant's petition to the Supreme Court. I have not contacted the Supreme Court here to see if they have it. It is possible they may still have a copy of it.

MR. SCHUMACHER: Your Honor, I have subpoenaed Mr. King as my first witness this morning and have issued to him a subpoena duces tecum, so, perhaps, he has a copy of the brief we could offer into evidence.

THE COURT: Is there any further statement to be made at this time?

MR. BELL: Nothing further from the Commonwealth.

THE COURT: Mr. Schumacher, do you want to proceed?

MR. SCHUMACHER: Your Honor, we have stipulated to the admissibility of Petitioner's Exhibits 1 and 2, each of which contain substantial sub-exhibits, consisting of P1A through P1GGG, and these

documents contain articles that appeared in the Courier Express, a Dubois Pennsylvania, newspaper, and also in the Clearfield Progress, during the period of time from April 29, 1966, up to and including the latest articles that would have appeared on October 10, 1981, for whatever relevancy the Court may determine in deciding the motion.

[7] THE COURT: Okay. Then, we will receive them. They are marked as Exhibit 22?

MR. SCHUMACHER: Yes, sir. They are all marked.

THE COURT: Okay. We will receive them.

MR. SCHUMACHER: In addition, Your Honor, a stipulation has been prepared, some of the items which I believe counsel can stipulate to as a matter of record. Now, I would like to read them, one at a time, with permission of the Court.

Number one: "The population of Clearfield County during 1966 was approximately 77,000 and, during 1970, was approximately 74,619."

MR. BELL: The Commonwealth will so stipulate to that, Your Honor.

THE COURT: All right.

MR. SCHUMACHER: Number two: "The circulation of the Dubois Courier Express, during 1966, was approximately 9,500, and, during 1970, approximately 9,500."

MR. BELL: Once again, the Commonwealth will stipulate to stipulation number two.

MR. SCHUMACHER: Stipulation number three: "The circulation of the Clearfield Progress, during 1966, was approximately 15,100, and, during 1970, approximately 16,250."

[8] MR. BELL: The Commonwealth again, for the record, would agree to that stipulation.

MR. SCHUMACHER: The further portions of the stipulation, Your Honor, deal with the admissibility of the exhibits that the Court has already accepted.

THE COURT: All right. Thank you.

MR. SCHUMACHER: May I proceed with the first witness for the Petitioner?

THE COURT: Would you, please?

MR. SCHUMACHER: Mr. King.

HOMER W. KING, called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SCHUMACHER:

Q Would you please state your name for the record, Mr. King?

A I am Homer W. King.

Q And your occupation?

A I am a lawyer, licensed to practice law in the Commonwealth of Pennsylvania and a number of other jurisdictions.

Q And for what period of time have you been licensed to practice law in the Commonwealth of Pennsylvania?

[9] A I graduated from law school in 1947, took the bar exams, and I believe I was first admitted to the Supreme Court early in 1948.

Q What law school was that?

A University of Pittsburgh.

Q And your principal place of business?

A Is in Pittsburgh. My office is in the Frick Building, down the street.

Q And, of course, you are a member of this court?

A I am, indeed.

Q As well as the Court of Common Pleas of Allegheny County?

A I am, indeed.

Q And of other courts in the Commonwealth of Pennsylvania?

A All courts in the Commonwealth of Pennsylvania.

Q Including Clearfield County?

A Including Clearfield County. Well, remember, back in 1966, we did not have statewide practice yet in Pennsylvania, but I was admitted to the court in Clearfield County for the purpose of handling Mr. Yount's case.

Q And were you retained to represent Mr. Yount?

A I was, indeed.

[10] Q Do you recall when that representation began?

A It was not too long after Mr. Yount was arrested and charged with this offense. I would say probably within thirty days after that time. I can't recall the exact date.

Q An article appeared in one of the local newspapers on September 26, 1966, that has been admitted into evidence, indicating that Homer King joined the defense of the case. Would it have been at or about that time?

A It could have been. I can't recall the exact date, but it was—it was not immediately after Mr. Yount was arrested. It was at least thirty days thereafter and could have been a little bit longer than that, but I would—I don't recall the newspaper article to which you referred, but I can visualize that there would be some time lag between the time I would get into the case and then, maybe, would formally enter an appearance, and I don't recall the date I actually entered my formal appearance in Clearfield.

Q Was it before the first trial?

A Oh, it was definitely before the first trial. The first trial, I think, was in about November. I think it was November of '66, and I was definitely in the case before that.

Q And so, then, what was your position, as it [11] related to his defense counsel, or his defense of the case?

A I was chief counsel.

Q And who assisted you in his representation?

A I had one of my office partners, Mr. Frank—Francis Sabino, assisted me; he was from my office. And a lawyer by the name of Blakeley, from Clearfield County, was our local counsel up there. Mr. Blakeley did not really enter into the trial, particularly, as such, but he was there, and we used his office for the purpose of preparing motions and papers and doing all the things that you have to do before you get into court, but Mr. Blakeley was associated for the purpose of the record.

Q So the questioning of witnesses and jurors was primarily conducted by yourself?

A Yes, sir.

Q And I think you indicated the name of the attorney that worked with you was Mr. Sabino?

A Yes, sir.

Q Did he also participate in the conduct of the trial, questioning witnesses and jurors?

A He was there. He was mainly my backup man and handed me the papers and kept tract of who was next, and things like that, the necessary things that you have to do when you have a prolonged trial and have a number of people.

[12] Q Would you explain to the Court the circumstances of your coming to represent Mr. Yount?

A My recollection is that a lawyer from a neighboring county, whose name was Bill McKnight, whom I had known for a number of years, telephoned me and asked if I would be interested in representing

Mr. Yount, and, at that time, I didn't know anything about the case, except, perhaps, I may have seen a newspaper article, and I asked him why he wanted — why he would call me. I am from Pittsburgh, and Mr. McKnight, actually, I think, was from the neighboring county, which was Jefferson County, and he said that Mr. Yount — he had known Mr. Yount's family, and he knew Jon, and he felt that there was no one in Clearfield County, no member of the bar in Clearfield County, who wanted to get into and handle the Yount case, and also, he felt that —

MR. BELL: Your Honor, I object to this. I think we are getting into hearsay matters as to what Mr. McKnight indicated to this individual.

THE COURT: Okay. Mr. Schumacher, let's just confine the testimony.

BY MR. SCHUMACHER:

Q Would you explain the community reaction to you when you arrived in Clearfield County?

A Well, when I first went to Clearfield County, I was not too well received. By that, I mean that people [13] knew, very promptly, who I was. And I stayed in the New Dimeling Hotel, which was right across from the courthouse, and, once I checked into the hotel and they knew I was a lawyer and they knew I would be getting calls from Pittsburgh, and, at that time, there was some newspaper publicity, and so, initially, the people sort of would cross the street when I was coming down one side, as though there was something wrong with me, and I was not too favorably received in the town, initially.

Q Did you continue to familiarize yourself with the newspaper publicity that followed the Yount matter?

A Well, I got a copy of every newspaper that came out, every day. At least, I tried to, and I kept these papers, to get an idea of just what the public reaction and public feeling about this situation was.

Q Did you feel that that publicity in any way impaired Mr. Yount's right to a fair trial?

A I felt that ever since this case began.

Q Would you describe the nature of the publicity?

A Well, the indication was sensational, because Mr. Yount being who he was and being a school teacher and is charged with these particular charges.

Q And they were?

A The charge of rape and murder one, and this [14] made the case sensational, and, without the—well, we felt, without the rape aspect of it, the case would not have been sensational, but that was there, and it was always referred to, and, when the case first began, I remember looking out the window of my hotel, and I could look out from the New Dimeling Hotel right into the courthouse, and the front of the courthouse, there was so many people that you really couldn't get through. In fact, when we went to the courthouse, on the first day, we called over there and had the Sheriff—I can't recall his name at the moment—come and get us and bring us in the back door, because we could not get in the front door. The entire street and the entire pavement, right out-

side the courthouse, was completely filled with people. There must have been over a thousand people there.

Q And did the case continue to attract community attention, as it progressed?

A It did, indeed. The courtroom, as I recall, seated 165 spectators, and every seat was filled, every day. We are talking about the first trial, now.

Q Yes, sir.

A Every seat was filled, every day, and, in fact, Judge Cherry announced, the first day of the trial, that the seats would be given out on a first come, first served basis, and there was no fair bringing your lunch into [15] the courtroom, because they wanted to kick everybody out at noontime, to help air the place out, and every seat in the courtroom was completely filled, every day.

Q And the case continued to be followed by the newspapers?

A My recollection is that, every day, there was some article in the newspaper about the case, every day that the case was in progress.

Q Where would that article appear?

A On the front page.

Q Was it also covered by radio and television stations in Clearfield County or adjoining counties?

A My recollection is that there was—there was something on the radio about it, every evening, and we would try to hear the evening news on the—either the—on the radio or on the TV, and my recollection is

that there was some mention of it at least every day during the progress of the trial.

Q Now, ultimately, then, following the first trial, Mr. Yount was convicted of both charges; is that correct?

A He was.

Q And could you describe for the Court the community reaction to that?

MR. BELL: Objection, Your Honor, if he knows [16] what the community reaction was.

THE COURT: Mr. King, if you know.

THE WITNESS: The general feeling, because it was people in the court—people filled the courtroom when the jury returned. The jury returned in the evening, about seven-thirty, eight o'clock, as I recall, and the courtroom again was filled, and there was—when it was announced that Mr. Yount was, in the jury's words, was guilty as charged, there was applause in the courtroom. Now, that is not the first time that that happened. When the trial first began, I think it was during the first day, it was almost like a Roman circus.

MR. BELL: Objection, Your Honor.

THE COURT: I can ignore that.

Mr. King, you are to continue.

THE WITNESS: What I wanted to say was, on the first day of the trial when I made an objection, if I was overruled, the spectators applauded. If my objection was upheld, they booed.

Judge Cherry called a halt to that, but that is what happened.

BY MR. SCHUMACHER:

Q During the course of that first trial, where were the newspaper reporters located inside the courtroom, if, in fact, they were in the courtroom?

A There was a press table right in front of the [17] Bench. If we can visualize the courtroom as something like Judge Mitchell's room where we are right now, the jury box would have been on the other side, would have been on the judge's right. Then, there was a counsel table right next to the jury, which would be the — which was John Reilly's table, the prosecutor's table. Next to that was another table, where I and Mr. Yount and my team sat, and then, to my right, was another table for the press people, and then, beyond that, on the other side, directly opposite from where the jury box was, were a series of seats where witnesses sat.

Q Was Mr. Yount sentenced at that time, when the verdict of guilty was returned?

A Yes. As soon as the verdict was returned, Judge Cherry sentenced him, right there, and the Judge's comment as to sentencing him was he wanted to get Mr. Yount out of the jurisdiction, and Mr. Yount was sent from Clearfield County, right from the courthouse — he may have stopped back at the jail to get a toothbrush, I don't recall exactly — but John went from the courthouse directly to the Western Penitentiary Classification Center, and Judge Cherry's stated reason was, he said, he didn't want Mr. Yount to remain in Clearfield that night for reasons of safety.

Q Do you recall whether or not there was a crowd [18] outside the courtroom at that time?

A There was, indeed.

Q Do you recall approximately how many people were involved in that?

A I did not count them, but you had to ask them to get—to move aside, in order to get through the crowds, in order to leave and get across the street, back to the hotel.

Q Would you estimate the size of the crowd to be more or less than a thousand people?

A It was less than a thousand, but I would say about 300, 350 people would be a fairly accurate count. The courtroom was filled, so that was 165 people, right there, and then, when we left, they were there, and there were people outside who couldn't get in, and so then, when we all left—"we," meaning myself and Mr. Sabino and some others, and I think Mr. Blakeley was there—and we left, we had to push our way through the crowd, and, when we got out, the crowd stretched all the way over the sidewalk, and the sidewalk outside the courthouse is about—well, it is about 20, 25 feet from where the face of the courthouse, out to the street, so that was all filled, and then the street was filled, and then we crossed and went over the the New Dimeling Hotel.

Q Did you follow the case of Jon Yount following the sentencing?

[19] A I did, indeed.

Q And what was the next course of action you took on his behalf?

A We filed the post-trial motions and also filed an appeal to the Supreme Court.

Q The appeal that was filed to the Supreme Court of Pennsylvania—I would assume that you prepared a brief on that appeal?

A I did, indeed.

Q Sir, when you were subpoenaed to come to court today, I issued a subpoena duces tecum, or the Court did, to bring all your records with you concerning this matter. Did you happen to bring with you the brief you filed to the Pennsylvania Supreme Court?

A I am sorry, I did not. I failed to bring anything. I thought I had already given your office everything I had, but maybe that was overlooked. I didn't notice I was to bring anything. My files on this case—I am sorry to say I could not carry them all, myself, to come down here, so I didn't bring them. I need about three caddies to bring the papers I have on this case.

Q Do you know whether that file contains a copy of the brief to the Supreme Court of Pennsylvania?

A Sitting here, this minute, I couldn't tell you, but I know I prepared and filed one, a rather elaborate [20] one, so I would think I still have a copy, although, over the years, I have given copies of numerous pleadings and copies of legal memoranda I wrote up in this matter to other people, but I believe I should have a copy of the brief. I will be glad to look for it when I go back and see that you get it.

Q But the issues raised in that appeal included an attack on the statement taken from Mr. Yount as being in violation of his constitutional rights; is that correct?

A Yes, sir; that is correct.

Q And was there an attack on the venue or failure to grant a change of venue?

A Yes, there was.

Q What other issues do you recall were raised?

A Well, the—one of the main issues, including of course, the failure to accord Mr. Yount his Miranda protections, was the fact that the Court had refused to grant my demurrer as to the charge of rape, because there was no evidence of any rape, and the Supreme Court of Pennsylvania eventually decided that, so that, when it came time for the second trial, the trial was only on the charge of murder, and there was no evidence of rape, at all, and my demurrer should have been sustained, and the Supreme Court so eventually found.

Q You also raised an issue pertaining to the [21] charge of the Court; is that correct?

A Well, I am sure I objected to everything that the Court did and that I feel was improper, and I can't give them to you verbatim, right at the moment.

Q But the most important aspect of the decision of the Pennsylvania Supreme Court was the fact that the conviction was reversed; is that correct?

A Yes, that is correct, after which the Commonwealth then took an appeal to the Supreme Court of the United States, that the Court refused certiorari.

Q And so, then, the case was returned to Clearfield County for trial?

A That is correct.

Q And, of course, you continued to represent Mr. Yount at that time?

A That is true.

Q And did you have occasion to investigate any publicity that occurred, following the reversal by the Supreme Court of Pennsylvania?

A Well, when you say "investigated," it was perfectly obvious that, when the Supreme Court reversed the conviction and sent the case back for a new trial, this made the front page of the Clearfield papers.

Q But the reaction, in the front page of the Clearfield paper—would you explain to the Court whether that [22] related to the opinion, the dissenting opinion, or what?

A Well, it was peculiar, in my opinion, that the newspaper account of the reversal did not mention the fact that they had—that the Court had eliminated the rape charge, and the newspaper account printed the dissenting opinion and just barely mentioned the fact that it was the dissenting opinion, but they printed the dissenting opinion almost totally and barely mentioned the fact that the conviction had been reversed.

Q Now, the issues that were raised prior to the second trial, which, I believe, occurred in 1970—did that include a request for a change of venue?

A It did, indeed.

Q And what was the reason for that request?

A Well, I felt, at the time of the second trial, as I had also felt at the time of the first trial, that it would be very difficult, if not impossible, for Jon Yount to receive a fair trial in Clearfield County. In fact, in my argument, in the discussion with the Supreme Court, as I recall, I said that, that I didn't want to say Mr. Yount did not get a fair trial, but I was positive that Mr. Yount could get only as fair a trial as Mr. Yount could get in Clearfield County, and so, when the time of the second trial came, I made numerous oral motions for a change of venue and a number of written motions, attaching to my [23] written motion various newspaper accounts that were printed and being printed about the trial.

Q So that that request for change of venue was related to the newspaper coverage that had occurred since the beginning of the case, to the time you were preparing to start the second trial?

A Yes, If you have the docket entries or if you have the papers that were filed and the pleadings for the second trial, why you should have in there numerous affidavits made by me that had newspaper articles attached as exhibits.

Q Was one of the factors you took into consideration, in requesting a change of venue, the prior conviction for first degree murder and rape, in Clearfield County, of Mr. Yount?

A Yes, because, you see, the people in Clearfield County didn't think of this charge against Mr. Yount as just being a murder, it is always a rape-murder, and, even though the charge, the second time, was on-

ly murder, the people kept thinking of it and talking about it as a rape-murder, even though that charge was not there, the charge of rape was not present.

MR. BELL: Objection, Your Honor, unless we can go into the basis on which he is making—the basis on which the people thought rape-murder.

[24] THE COURT: Sustained.

BY MR. SCHUMACHER:

Q Mr. King, were you concerned as to any publicity concerning statements made by Mr. Yount that were admitted in the first trial, that had no longer become admissible because of the ruling of the Supreme Court of Pennsylvania, and, if so, relate to the Court how.

A You say, was I concerned about it? It certainly was part of the trial strategy that this had to be taken into consideration, and this was one of the main considerations in not putting Mr. Yount on the witness stand in the second trial, because, had he been put on the witness stand, then he would have been subject to cross examination, based on his testimony in the first trial, and, if it was done in that way, I was of the opinion, at that time—and I still feel the same way—that the statements that should not have been admitted in the first trial could now be brought in, in some way or another, in the second trial, and so the whole impact of the Supreme Court's ruling, initially, would be negated, if he was allowed to testify in the second trial. But the other reason, the other reason for not putting Mr. Yount on the witness stand in the second trial was that I was convinced that I had reversible er-

ror in the second case by the Court's failure to grant the change of venue, especially since the Court [25] had indicated that it would grant the change of venue if we did not seat a jury within a certain period of time. Keep in mind that, in the second trial, it took two weeks to pick the jury and only one week to try the case. We went through 260-some jurors before we eventually seated 14 in the second trial, and, when these people were interrogated as to their qualifications for jurors, they continually said, "Oh, yes, Mr. Yount, he is the man who—" this came right from the prospective juror—"he is the man charged with rape and murder." This is what they would say.

Q Did the answers to questions by those jurors indicate whether or not many of those jurors had fixed opinions as to the guilt or innocence of Mr. Yount?

A Very definitely.

MR. BELL: Your Honor, we would object, at this point. We do have a voir dire transcript included in the report of this case, and I believe that would speak for itself as to what the jurors indicated.

THE COURT: Your objection is overruled.

THE WITNESS: Yes. The jurors stated very definitely—that is, many of them did—that they had an opinion that was fixed as to Mr. Yount's guilt; none ever said they had a fixed opinion as to his innocence. And then, of course, the next question that is always asked in [26] these situations is, "Is this opinion so fixed that it could not be changed by the evidence that would be presented and the instructions of the Court?" And

a very common response to that question was, "If he can convince us that he is not guilty, why, then, maybe we would believe him." Now, This was a very common response.

BY MR. SCHUMACHER:

Q Did you receive common responses as to whether or not those jurors or potential jurors had read about the case?

A Well, this was one of the questions that was always asked: "Have you known Mr. Yount? Do you know anything about Mr. Yount? Have you read anything about Mr. Yount?" And many of the jurors said yes, they had read the newspaper account, and also, they had read or heard radio and TV accounts, and, on the basis of this, had formed opinions.

Q After you began the selection of the jury and exhausted the first panel without seating a jury, had you arrived at any conclusion as to whether or not, in your opinion, a jury could—of impartial jurors could be impaneled in Clearfield County?

A Yes, I had arrived at an opinion. I did not—my opinion was that an impartial jury could not be impaneled in Clearfield County.

[27] Q After the first panel of jurors were exhausted, and you had not selected an entire jury to seat on the case, another panel was selected; is that correct?

A That is correct.

Q Would you explain to Magistrate Mitchell how that came about?

A We ran through the first panel of potential jurors. I can't recall exactly how many were in that group, but it was about a hundred. Then, there was a backup panel that Judge Cherry had called, and we—then we ran through a big part of those, so, now, we had no more jurors. So, now, the Judge instructed the Sheriff to go out and select talismen from the streets, under the Pennsylvania rule, so we recessed for a day, to permit the Sheriff to go and round up potential jurors. So, when we showed up in court the next day, the first person that I called was the Sheriff, to ask how he had gone about rounding up all of these people, and the Sheriff testified that he and his deputies had gotten on the telephone and called up people whom they thought would be ideal jurors on the Yount case and had asked those people to come in and be jurors. And so I questioned him about this, and he was very frank about it, that this is exactly what he had done. He had just telephoned people, and he had called up mister so-and-so from across town and somebody else from across town, all people, in his opinion, [28] he thought would be good jurors on the Yount case. Whereupon I then entered a challenge to the array, and Judge Cherry agreed this is not the way jurors are to be selected when they must be chosen from the streets, the Pennsylvania rule being that you must go out and get the first people that you can see, and the only qualifications are that they be, at that time, over the age of 21 and be able to read and write, and that had not been done, so—whereupon that entire panel of jurors was then dismissed, and the Sheriff was now instructed to go out and select other jurors, but, this time, the Judge gave the Sheriff specific instructions as to how you are supposed to do

this. You can't really blame the Sheriff. After all, I don't think that this type of situation had ever occurred before in Clearfield County. As a matter of fact, to my knowledge, it is one of the very, very few times in the history of Pennsylvania.

Q As the selection of the jury continued, did you continue to raise your request for a change of venue?

A I did, indeed, because, after you ran through two regular panels and two special panels of jurors, and we still didn't have a jury seated, it was becoming increasingly obvious to me and, I thought, should have been perfectly obvious to everybody else, that the chance of getting any kind of a jury that you could consider impartial was almost non-existent.

[29] Q Did it ever become obvious to the Court?

A In my opinion it did, because we—meaning myself and Judge Cherry and John Reilly—had discussions about this all the time, particularly whenever the Sheriff was told to go out and find some more jurors. This didn't happen once or twice. The Sheriff had to go out and find more people as prospective jurors at least eight or nine times. The first time, we washed them all out, of course, but it was eight or nine times thereafter that the Sheriff had to go out and bring in more people for us to question. And so, towards the end of the jury selection process, when I believe that we had seated maybe seven or eight people, Judge Cherry said that if we did not seat a panel with this next group of talismen that were brought in, he was then going to grant my change of venue. And so, when the next group of prospective jurors came, we

started our questioning and challenging, and then we were down to about four or six people left to question, and it was obvious, then, that if I just used preemptory challenges, we would still not have enough people, enough jurors to seat twelve plus two alternates. And, on that basis, I used preemptory challenges and exhausted my challenges, but—at which time we had seated eleven jurors, whereupon Judge Cherry said, “Well, since we are only three short, I am going to go bring in more people, because maybe we can get a jury now,” which, [30] of course, was a reversal of what he had told us previously.

Q Was the statement of Judge Cherry made a part of the record?

A That statement was not made a part of the record. That was done in a discussion, because we had many discussions that were not on the record. That statement was not made in open court. It was done in the Judge’s office, in the Judge’s chambers.

Q Were the statements that were not made a part of the record done so at the instruction of Judge Cherry, at your request, or what?

A Well, it came about in our discussion as to whether or not he should grant my change of venue, because I made this motion every day, and we would—I would make the motion on the record, and then we would, sometimes, have a discussion about it off the record, and, while the Sheriff was out rounding up more people to bring in, the Judge and I and John Reilly, the District Attorney, would go into the Judge’s chambers and sit down, and we would continue our discussion or argument, depending upon who was say-

ing what, but this was not made part of any record, as I recall.

Q On one occasion, did you specifically request that your motions for change of venue, which had been orally made, be made part of the record?

A I did, indeed.

[31] Q And do you recall approximately how many such motions you made during the course of the voir dire examination of the jurors?

A My recollection is that I made at least one every day.

Q How many total would that be?

A At least ten.

Q During the course of the impaneling of the jury, did the community interest continue or not?

A My recollection is that the community interest continued. Of course, during the jury selection, I made a motion that the public be excluded as much as possible, and, also, I made a motion to sequester the prospective jurors, because anybody who has ever tried a capital case, where the jurors are interrogated individually, knows that, after some prospective jurors hear another prospective juror questioned, hear two or three of them questioned, then the people know exactly how to answer the questions, if they want to get on or if they want to get off of the jury. So it is imperative that you have prospective jurors sequestered in any kind of a capital case, and this, of course, was what was done here. Now, there is always the problem, of course, when you are trying to limit the public

from coming in and listening to a trial, but Judge Cherry agreed, finally, after we had some long discussions about it, that, [32] since we were in the process of going out onto the street and collaring people and bringing them in, this would be self-defeating if we did not limit the number of spectators in the courtroom. So the interest was there, but we deliberately kept spectators out of the courtroom because of—you might be a spectator today, and, tomorrow, you might be a juror.

Q Did the selection of the jury continue to be front page news in the local newspapers, or was it less thoroughly covered than had been previously noted?

A Well, in a sense—we are talking about the second trial, now—it was less thoroughly covered, because Judge Cherry instructed the newspaper people to cooperate, when he explained the problem that we were having, and so there was a little less—I would say there was less publicity in the newspaper during the jury selection process in the second trial, but this was due to Judge Cherry's efforts, and he was trying to keep the procedure so that we could get a jury.

Q On one occasion during the impaneling of the jury, at the second trial, did Judge Cherry stop the selection of the jury to entertain a motion for change of venue?

A Well, yes. Well, he always did that, whenever we—whenever I would make the motion for change of venue, he would dismiss the jurors that had already been [33] seated, or we would have the argument in his chambers.

Q I mean not on your motion, but on his own, did there come a time, during the selection of the second jury, for the second trial, that he stopped the voir dire and indicated that it was impossible to select a jury?

A I believe so, but I can't recall any of the exact circumstances, as to just where we were in the process; but the answer to that is yes, he did do that.

Q Do you recall recessing for several hours, one afternoon, while legal arguments were presented, and a ruling being made by the Court the following morning?

A Yes, I definitely recall that.

Q How many preemptory challenges did you have?

A Twenty.

Q And do you recall how many the Commonwealth had?

A Twenty.

Q Did you exercise all of your challenges, your preemptory challenges?

A I did, indeed.

Q Do you recall whether or not more than twenty preemptory challenges were granted to you?

A At this time, I don't recall.

Q Do you recall—

A I know I asked for more, because of the [34] circumstances and because there were some jurors,

prospective jurors, whom I felt should have—my challenge for cause should have been upheld and was not, and I had some reason. I felt I should be entitled to a few more challenges because of that; but I don't recall the exact number.

Q Do you recall being given additional preemptory challenges, based on the illness of one of the jurors that had been selected?

A I have a vague recollection of something like that. I think there was one or two jurors who were selected and then, sitting there, and since this dragged on, this whole jury selection process dragged on for two full weeks, and I think some juror that originally had wanted to be a juror or answered the questions properly then had a change of mind or something like that and then asked to be excused, but whether it was for illness or some other family reason—I recall it happening. I don't really recall the details.

Q Well, do you recall whether or not you exhausted your preemptory challenges before the jury was impaneled?

A Oh, I definitely exhausted my preemptory challenges before the jury was impaneled. Otherwise, the jury would not have been impaneled. So long as I had a challenge left, the jury was not going to be impaneled. [35] And then, when I could not successfully challenge a juror for cause, I would then necessarily have to use one of my preemptory challenges, and this was under the understanding of Judge Cherry that, if we didn't seat them by the time we exhausted these few people that were left, why, he was going to grant my change of venue. So I ran out of challenges, and that is when the jury got seated.

Q Do you remember whether or not closing the courtroom during any phase of the second trial had anything to do with the personal safety of Mr. Yount?

A Yes. There was a story related by one of the deputy sheriffs —

MR. BELL: Objection, Your Honor. It calls for hearsay.

BY MR. SCHUMACHER:

Q Well, without relating what anyone else told you, were you able to ascertain whether there was any other reason for closing the courtroom?

A Any other reason? Well, the safety of the people in the courtroom, including Mr. Yount; including me, too. I was sitting right beside him.

Q Now, as the second —

THE COURT: Excuse me, one second. When was this closed? In time reference, at what point was the courtroom closed?

[36] THE WITNESS: This was during the second trial.

THE COURT: During the trial on the merits after a jury selection?

THE WITNESS: After the jury's selection, yes, this was during the trial on the merits.

THE COURT: And was it for the entire duration of the trial?

THE WITNESS: No. It was — well, it was the last — about the last two days of it, I think,

Judge when this incident occurred. Somebody had a weapon.

THE COURT: Thank you.

BY MR. SCHUMACHER:

Q That was after the trial of the second case started, this incident occurred?

A Yes, about the last two days of it, I believe.

Q And the person or persons that were in danger were whom?

MR. BELL: Objection, unless he knows, once again.

THE WITNESS: Well, from what was said, I know that I was in danger, and—because I was sitting right next to Mr. Yount, and Mr. Yount was obviously the primary target, but I was sitting right next to him, and I felt I was in danger, too.

[37] MR. BELL: Once again, Your Honor, we would ask that answer be stricken, based on the fact it is based on hearsay.

THE COURT: I think Mr. King can testify as to why the courtroom was closed.

MR. BELL: Yes, if someone stated why it was closed, but he indicated Mr. Yount was in danger, but he hasn't stated—

THE COURT: Mr. Schumacher, can we determine why the courtroom was closed?

BY MR. SCHUMACHER:

Q I will have to admit this is the first time I was aware this even occurred, so I would ask you if you could answer Magistrate Mitchell's question. Was there any conversation with the Court, with regard to the closing of the courtroom?

A Yes. The Court called a conference, Mr. Reilly and myself and Mr. Sabino and the Deputy Sheriff, and the Deputy Sheriff reported to the Judge, in my presence, that a person had attempted to come into the courtroom carrying a weapon, and this person had a very antagonistic attitude toward Mr. Yount, this person being a relative of the victim, of the deceased, and this was reported, and whereupon Judge Cherry said he would then close the courtroom.

[38] Q During the period of time, during the second trial, that the courtroom was open, were there spectators in attendance?

A Yes, there were.

Q Were there many spectators in attendance?

A My recollection is that the courtroom was fairly well filled every day.

Q Was it as well filled as it was during the original trial?

A I think the courtroom itself was, because I don't recall any empty seats. During the trial itself — not during the jury selection, but during the trial itself, the courtroom was fairly well filled, as I recall, and, as I said before, I have this very definite knowledge that the courtroom holds 165 people.

Q The reason for the question, if the Court would permit, is the fact that Judge Cherry filed an opinion, following the second trial, where he indicated that that fact was not true. I would ask to clarify that for Magistrate Mitchell, whether or not there were very few people in attendance, normally, while the second trial took place, many people, or whether or not the courtroom was full, as best you can recall.

A Well, my recollection differs from Judge Cherry's that, during the trial, the courtroom was more full [39] than not full. In other words, I would say it was—I don't think there were as many people around as there were in the first trial, but I would say that the courtroom was more full than more empty.

Q And did the media continue to cover the second trial, as they had the first?

A Well, you asked me two questions. Did the media continue to cover the trial? The answer is yes. Did they continue to cover the trial as much as they had the first? I am not sure about that.

Q Probably it wasn't a very clear question. Were they in the courtroom, at a table, like you indicated at the first trial?

A Yes, they were.

Q And was it on a daily basis?

A Yes, they were.

Q How many reporters would normally be in the courtroom on a given day?

A I would say it would average at least two. They would come and go.

Q They would be seated at a table, similar to the one you had previously described?

A Yes. The courtroom was set up the same way the second time as it had been the first time.

THE COURT: Mr. Schumacher, how about if we [40] take—let's recess until about 11:30.

(A short recess was taken at 11:20 a.m. o'clock.)

THE COURT: Mr. Schumacher, do you want to continue, please?

MR. SCHUMACHER: Yes.

BY MR. SCHUMACHER:

Q The second trial of Mr. Yount also resulted in a conviction; is that correct?

A That is correct.

Q That conviction was for?

A Murder one.

Q And the sentence imposed?

A Life imprisonment.

Q And did you continue to represent him on appeal?

A I did.

Q And was that appeal to the Supreme Court of Pennsylvania?

A It was.

Q And could you tell the Court what issues were raised at that appeal, as best you recall?

A Well, the primary issue was the refusal of the Trial Court to grant the change of venue, and secondly, the—see, all the evidence of the murder in this [41] case was circumstantial, and I was of the opinion that, once the felony murder element was taken out of the case, which was the rape situation, and there was no rape in the second case—there was no rape charge in the second case—I felt that the evidence did not justify a murder one situation, that all of the facts and circumstances and everything didn't measure up to any more than a voluntary manslaughter, assuming, of course, that there was grounds to find a conviction in the first place.

Q Did you raise any issue pertaining to any statements that were taken from Mr. Yount by State Police?

A Not in the second trial, because Mr. Yount did not testify in the second case, so the statements that he made and everything that had been admitted in the first case, I don't think were in issue the second time. That is my recollection, but I would have to—I haven't looked at the brief or anything that I wrote for the second appeal, so I don't recall whether there was an issue there on that point or not. If you have the record, whatever the record shows, that is what I will go along with.

Q And you will attempt to secure a copy of that brief?

A Yes. I am surprised you don't have it, but I still have voluminous papers, and I will try to find it. You want my brief from the first case or the second case, [42] or both?

Q Both.

THE COURT: Mr. Schumacher, I wonder if it might not be easier if we just call the Supreme Court and see if they have it, because I assume their files are less voluminous than Mr. King's, and perhaps we could get that, both, to copy.

MR. SCHUMACHER: Yes, and perhaps the Commonwealth would consent that it is going in, in evidence.

MR. BELL: The Commonwealth will consent that.

THE WITNESS: You will let me know; okay? I will not look, unless you tell me.

MR. SCHUMACHER: Yes.

BY MR. SCHUMACHER:

Q Whatever issues were raised in that brief were decided adversely by the Supreme Court of Pennsylvania; is that correct?

A That is correct.

Q Was any appeal for certiorari taken to the Supreme Court of the United States?

A No, not after the second trial.

Q Did you continue to represent Mr. Yount after his conviction?

A Well, I suppose you could say, inasmuch as I have continued to correspond with him and be with him, [43] although I have not participated in any active representation so far as preparing any pleadings or documents or anything formal. However, at his re-

quest and at the request of his officers in charge of the probationary proceedings, I have appeared and made myself available at each of the parole hearings that Mr. Yount has had, since he started to file parole petitions, and I have made myself available to answer any questions that the parole board may have or that anybody else may have as to the mechanics of either of the trials and/or anything else that I could help with. So I have represented him in that respect, but I have not filed papers myself or anything.

Q On approximately how many occasions have you appeared on behalf of Mr. Yount, in request for his release on parole?

A I would say at least eight or ten, and I don't know how many times the matter has come up, but I think only on one occasion did I not appear, and that is when I was engaged in trial over in Philadelphia or some place, and I wasn't here when they had that hearing; but I believe at all of the others, I did appear.

Q Is there anything that would have occurred during those approximately eight appearances that would have indicated continued community interest, in Clearfield County, in connection with the case?

[44] A Very definitely. On every one of those parole hearings, the mother of the deceased girl has appeared. That is, every one that I have been in, she has also appeared, and she has been extremely vehement in her position that she does not want Mr. Yount released in any way, shape, or form or any circumstances. And, on another occasion that I recall very vividly, a young man, who has a law degree, ap-

peared, and he was also a candidate for District Attorney in Clearfield County at the time, and he appeared, carrying what he claimed were about 2,200 signatures on a petition, all signed by citizens of Clearfield County who specifically did not want Mr. Yount considered for parole. And there have been several occasions when people have come in—"people" meaning citizens from Clearfield County—have come in, and, sometimes, these were presented by the current District Attorney in Clearfield County, sometimes they were presented by just citizens, not a law person, with petitions claiming that these were signed by citizens up there, very, very adverse to any idea of Mr. Yount being granted any commutation of sentence and parole.

Q Do you recall when the most recent such occurrence would have taken place?

A Well, the most recent occurrence, recent parole hearing, was just several months ago, several meaning about last February or March, I suppose it was—maybe it [45] was May of this year. Mrs. Reimer appeared and made her usual vitriolic speech about not wanting Mr. Yount paroled. I think that, at the parole hearing the year before, the District Attorney's Office from Clearfield County claimed to have papers with signatures on it, people who were opposing this. Now, those papers are all supposedly filed. At least, the Attorney General presiding at the parole hearing asked that these petitions be filed, so they should be available at the parole office, and they would be able to give you an exact count as to the number of papers that had been filed in opposition to Mr. Yount. But these people stated that at the parole hearing, that

they had all these signatures of people who were expressing an opinion that they did not want Mr. Yount considered for commutation and parole.

MR. SCHUMACHER: I have no further questions, Your Honor.

THE COURT: All right, Mr. Bell.

MR. BELL: Thank you, Your Honor.

Cross-Examination

BY MR. BELL:

Q Mr. King, you indicated that your initial appearance in this case was some time a few days, a few weeks, after this incident first occurred; is that correct?

A No. I think I said it was probably within [46] about thirty days I was initially contacted, and then — but I did say definitely I was in the case before the trial began.

Q Okay. And associated with you, you had Mr. Sabino from your office.

A That is correct.

Q And Mr. Blakeley, from up at Clearfield County; is that correct?

A Yes, sir.

Q Now, Mr. Blakeley actually didn't do anything with regard to the trial, as far as examining witnesses, etc. He was just local counsel, that you could use his office, etc. Is that correct?

A That is true. I mean, he may have done a couple other little things, but I really can't recall.

Q He didn't play a major part in the trial?

A No. I was chief counsel, and I decided the sequence of witnesses, and I asked all the questions. I made the openings and closings, and I did the major part of the chore.

Q Okay. Now, with regard to your appeal, as to the first trial, at any point, did you have occasion to examine the record of the case before you filed your appeal?

A I don't know that I understand your question. Have occasion to examine what record?

[47] Q The transcript of the trial, etc., of the first trial we are talking about.

A I can't—I would be inclined to think that I did, because, in preparing the brief and everything, you make notes and everything, so I would think I did refer to it, from time to time, but however I refer to it in the brief, that is what I said, but, if you ask me to remember for you on which page of the transcript something was said, I am afraid I wouldn't be able to do that.

Q And you indicated here, today, that, with regard to the first trial, as it was proceeding—in fact, you indicated that, if your first objection was overruled by the Court, the people would cheer and clap, or, if you won an objection, they would boo; is that correct?

A That is actually what happened.

Q. Are those items reflected in that record?

A. No, they are not, as I recall, just as the record is devoid of an incident that occurred during the first trial, when Mrs. Reimer was testifying and — assuming she testified on direct examination under John Reilly's questioning, very well, perfectly calm, perfectly composed. When I asked her, I think, the first question, she rose to her feet, screamed, "I can't stand the sight of that man any more, I can't stand this, I can't stand this," and she collapsed in the courtroom.

[48] Q. Okay. Now, that isn't on the record?

A. That is not in the record. And, as soon as that happened, I made a motion for a mistrial. I asked Judge Cherry, at that time, that I wanted to see that this was all on the record. And, incidentally, the court reporter there had a recorder, at that time, and I asked that that recording be impounded, so that it would reflect this lady's scream, which I felt was extremely prejudicial and extremely inflammatory, and the Judge said, "Okay, all in due time, later on." When we tried to replay that tape, it was all erased. That tape was erased, and, also, the court reporter never recorded any of these other things. But that did not come to my attention, and I didn't find out about that, until some time later, but that is exactly what happened.

Q. Okay. Now, then, I presume that Judge Cherry and Mr. Reilly would have recollections of these things happening, also; is that correct?

A. I have no idea what Judge Cherry and John Reilly's recollections would be. I am telling you what mine is, and I have a very definite recollection of it.

Q. Were they present when all of these items occurred?

A. They were, indeed.

Q. Now, you indicated that Judge Cherry has made representations to you that, if a certain panel of jurors [49] was exhausted, he would grant the change of venue; is that correct?

THE COURT: This is on the second trial; is that correct?

THE WITNESS: Yes, it was on the second trial.

MR. BELL: This is on the second trial; yes.

BY MR. BELL:

Q. And you used that as one of your bases for a post-trial motion; is that correct—the fact that this had been represented to you, that you had been promised this change of venue?

A. I believe so; yes.

Q. And are you aware—

A. Whatever the document says, whatever I wrote at the time that I wrote it, eleven years ago, why, that—

Q. That would reflect your recollection?

A. Yes, yes.

Q. Are you aware of Judge Cherry's opinion with regard to your post-trial motions, in denying those post-trial motions, in denying your motions in the second trial? Have you had an occasion to review that?

A. Not in eleven years.

Q. At some time, you did review it?

A. I assume I read everything that Judge Cherry wrote about the entire case at some time or another, but I [50] haven't reviewed it lately.

MR. BELL: Your Honor, Judge Cherry's opinion is filed with the official court papers. I have now had occasion to obtain a certified copy of his opinion as to the details of the post-trial motions at the second trial. If the Court would permit, I would like to hand Mr. King a copy of that and have him read one statement from it.

THE COURT: Is there any objection?

MR. SCHUMACHER: Yes, sir. No objection to using a copy other than the original; no.

BY MR. BELL:

Q. I am handing you a copy of the opinion of Judge Cherry, on Commonwealth versus Jon E. Yount, number two, May session, 1966, that being the opinion of the Court. I am directing your attention to the third page, and I have underlined a certain sentence. Would you read that sentence into the record?

MR. SCHUMACHER: Your Honor, I object to the procedure utilized in questioning the witness.

THE COURT: Do you want the witness to read the sentence to himself?

MR. BELL: I would ask the witness to read it into the record, unless I can have the Court indicate it would refer to the records in rendering any—

THE COURT: The records are so voluminous, [51] it will be hard to pick out some sentence.

MR. BELL: That is why I prefer to have the witness read it into the record.

THE COURT: What is your objection?

MR. SCHUMACHER: That is asking Mr. King to read it himself, to refresh his recollection, is one thing; if the District Attorney wants to refer to that in the briefing of his case, he can do so. I think this is improper cross-examination.

THE COURT: Mr. Bell, what is the purpose for asking this, just to put it in the record?

MR. BELL: Yes. It was just to put it in the record. I think I can do that by brief.

THE COURT: I think that would be more appropriate.

MR. BELL: If I could have Mr. King read it to refresh his recollection—

THE COURT: Go ahead.

MR. BELL: Have you read that particular statement I have indicated?

THE WITNESS: Yes. I have read it.

BY MR. BELL:

Q. Mr. King, now that you have read the statement by Judge Cherry, does that conform to your recollection as to what occurred?

[52] A. Absolutely, positively not. The Judge's recollection and my recollection are completely different. It happened as I said it happened, and I remember reading Judge Cherry's opinion before, and I denied what he said there, then, at that time, and I deny it today. He did exactly as I said he did, and that is all there is to it.

Q. Okay. Now, as to actual jury selection, you stated you were the person that did the majority of the questioning of the panel, the selection of the jury; is that correct?

A. That is correct.

Q. And did you also raise the various objections, the various preemptory challenges, or challenges for cause?

A. You mean was I the one speaking all the time? I think, for the most part, yes, although I am sure Mr. Sabino said something, from time to time, because he would probably have to do something besides sit there and sharpen pencils. How is he going to learn if he doesn't get a chance to participate? So I am sure I permitted him to ask a few questions now and then, and I am sure I had him ask a couple of the witnesses questions during the trial, but I can't delineate for you, at this moment, exactly what part; but, for the main part, I decided everything that was to be decided.

Q. Do you have any recollection of the number [53] of the panel of twelve who were selected without any objection whatsoever, without any objection by yourself or by the Commonwealth?

A. In the second trial?

Q. In the second trial, where no one raised any questions, where they had their voir dire, and they were seated without any questions of any sort?

A. I can't recall that, because the—nature is so very kind to all of us, you see, we always remember the unusual things and everything, but we don't remember the things that happen as a matter of course. If somebody—if some prospective juror met all of the qualifications and everything and, therefore, there would be no basis to object to him or to her, why, this would not serve to strike any kind of memory of it, in my mind, anyway; but those who were particularly biased or prejudiced and who showed it in a particular way, these, I would remember,

but somebody who was just an ordinary person, I don't recall, so—I hope I answered your question.

Q. Well, didn't you indicate that the community pressure and prejudice was sufficient that you felt that Mr. Yount's trial was impaired, his selection of a fair jury was impaired?

A. I think it is perfectly obvious that the selection of a fair jury panel was impaired, when you have [54] to go through 260 or 340 jurors, whatever the number was, in order to seat a panel of jurors. I think that is perfectly obvious, that you are in a bad situation.

Q. Would it surprise you if I told you you only went through 167 individuals with regard to the voir dire examination?

A. Yes. I think there were more than that. I think your count is bad, because I think you are probably eliminating the whole group of about one hundred that we dismissed at one fell swoop.

Q. Because of the improper selection of the array?

A. Yes.

Q. You count those as people who were examined, even though they were not examined?

A. No, I didn't count them as examined. I count them as jurors who were called and then dismissed, because, obviously, those people were not qualified to be jurors, because of the manner in which they had been selected.

Q. Right. There wasn't anything about their personal knowledge or the press or anything like that?

A. The Sheriff who selected them felt their personal knowledge was such he wanted them to be jurors, so I disagree. I think they should be counted, yes, but—

Q. Would it surprise you if I indicated to you approximately 99 percent of the original 12, of the original [55] jury panel, was selected without any challenges from either side?

A. Are you asking me to say either side?

Q. Does that surprise you? Does it sound about right, or—

A. You would have to tell me over what period of time they were selected. I mean, you are not telling me the first nine jurors that were seated—

Q. No.

A. See, the way your question is asked, that is what it indicates, and that definitely is not true, but, obviously—obviously, if we eventually did get 14 jurors, which we did, there must have been 14 people, or at least, say, the first ten or twelve of them, must have been satisfactory, or there must have been some reason—no reason why we could not disqualify them, either for cause or on the basis of preemptory challenge.

Q. Okay. Now, you indicated today, in your testimony, that, with regard to some of this press, that, at one point, there was the dissenting opinion of the Pennsylvania Supreme Court written and published in the Dubois paper, I believe, just the dissenting opinion, and that that was as to the reversal of the first trial conviction; is that correct?

A. That is my recollection, yes, whatever the [56] newspaper article says, it says. My recollection is that the dissenting opinion was printed almost in its entirety, and the reference to the majority opinion, which had granted the new trial, was just sort of mentioned in passing. In other words, it was a disproportionate coverage, is what my recollection is. But whatever the article says, it says.

Q. Do you have any recollection or do you have any information which would lead you to believe that the full opinion of the Court was printed prior to the time that dissenting opinion was printed in the Dubois paper?

A. I have no recollection of that, right offhand, but what I said before—I supplied Mr. Schumacher with all of the newspaper articles that I have, and whatever they show, they show. I mean, I didn't go through them and select one and eliminate another. I gave him all of the articles, and I believe that I have a fairly complete copy, but I did not select any article, is what I am trying to tell you.

MR. BELL: Your Honor, once again, if I might approach the witness and have him examine a copy of a letter to himself from the Dubois Courier Express, it might refresh his recollection as to the publishing of articles.

THE COURT: Go ahead.

(The witness examined documents handed to him by Mr. Bell.)

[57] BY MR. BELL:

Q. Does that item refresh your recollection as to the publishing of that dissenting opinion and the majority opinion?

A. Oh, vaguely, it does. I mean, I knew that it was published, but, like newspapers do so many things, they are strong to accuse and everything, and then, when it comes to printing the retraction, they put it on the back page with all the classified ads. Now, I don't recall specifically where those articles were published, but that letter was written to me, and I do have a recollection of receiving it.

Do you have a copy of my letter to the newspaper, where I criticized them for the way in which they did it? Do you have my letter to them?

MR. BELL: Your Honor, I believe I am asking the witness questions, as opposed to him asking me.

THE WITNESS: Sorry about that. I am used to sitting over there.

BY MR. BELL:

Q. Now, with regard to that particular letter I showed you to refresh your recollection, is it true that you have filed this particular letter as an exhibit with regard to the hearing that you had on the change of venue held July 29 of 1970?

A. If that letter is attached to a legal pleading [58] that I filed, then the answer is yes, although, at this moment, I have no recollection of that.

Q. Okay. And, once again, this letter is contrary to your representation that just the dissenting opinion was printed. This indicates the full opinion was also printed at some time.

A. That letter indicates that, but, as I am saying, my recollection is that the lead story and the big story on the front page was the excessive publication of the dissenting opinion. They were not published in equal importance, is what I am trying to convey to you. That is my recollection.

Q. You don't recall exactly where each story was printed in the paper?

A. No, I do not, not at this moment, but, if you have the newspaper articles themselves, there should be some indication there as to where they appeared in the paper, although there may not be.

Q. If we turn to the jury selection for the second trial, you indicated that, with regard to witnesses of that selection, that the Court tried to keep as many people out as possible, because they may be people who might be selected to the next panel.

A. That is my recollection, and it became necessary that the jurors were now going to have to be [59] selected from the general public, from the general talismen.

Q. Did that come to the front during the first day of jury selection, that there were going to have to be more people selected?

A. No. No, it did not, because I think we had—I think we had, maybe, 50 people in the first panel, and I don't think we ran through those till, maybe, the third day.

Q. It took a fairly long time to go through each person?

A. Yes. Each witness, I would say, averaged about—oh, they averaged fifteen or twenty minutes per witness, so you can't mathmatically say how fast you can move on that.

Q. Do you have any recollection whatsoever as to how many witnesses observed jury selection, for example, the first day or the second day? Was the courtroom packed, was it half full, was it less than full, whatever?

A. I would say it was at least half full, between half—I wouldn't say it was packed, because jury selections are usually pretty dull, anyway, and, also, the general public is behind me, I am facing the other direction, and so I wasn't really turning around, looking at them, all the time.

Q. Would it surprise you if I indicated to you that an affidavit you filed in this particular matter as to

[60] various newspaper articles—which I believe are included within the exhibits already introduced before this Court—indicate that, with regard to the first day, there were just six spectators in the courtroom? That is the first day of the jury selection.

A. Was your question to me, would it surprise me?

Q. Yes.

A. If I filed an affidavit that said that, I am sure that that is what I felt and that is what I knew at that time, although my recollection today is that there were more people than that, although—

Q. So your recollection today might not be correct; this would represent a more accurate reflection?

A. Without seeing the entire affidavit, I am sure the affidavit says more than that; doesn't it?

Q. Yes. The affidavit also indicates that, after lunch, one spectator was in the courtroom.

A. Does it?

Q. Yes.

A. Whatever that affidavit says—was that during the jury selection, or was that during the trial?

Q. That was during the jury selection.

A. During jury selection. Well, then, that would have been after we made the motion to Judge Cherry to [61] try and cut down the number of people there.

Q. Do you happen to have any knowledge, now—you indicated you came up to Clearfield County at the request of someone else.

A. Yes.

Q. Had you ever been to Clearfield County before on any matters, criminal or otherwise?

A. No, I don't think so.

Q. Do you have any knowledge as to the size of Clearfield County, as opposed to other counties? Is it one of the largest counties in the state?

A. I am of the opinion it is one of the smaller counties. It is not as small as, say, Elk County or Clinton, perhaps, or maybe some of those a little further north and west, but I am of the opinion that Clearfield is one of the smaller counties.

Q. Okay. Now, are you talking about population size or physical size?

A. I am talking population.

Q. What about physical size. Do you have any knowledge as to how big it is?

A. Well, physical size, all those counties up there are pretty much the same. Of course, none of them are as large as Allegheny County, and Allegheny County is, I think, the physical size is the largest county in the state, [62] but Clearfield County, I don't think I could give you the number of square feet or square miles or something, but it is an average size for up in that part of the state.

Q. Now, you have indicated in your testimony here today that, with regard to the selection of the panel, your recollection is that the Sheriff or someone had to go out about eight or nine times, throughout the jury selection, to bring in people; is that correct?

A. That is my recollection, because he would go out and get some, and then the Judge would tell him, "You better get some more," so he would go and bring them in at, maybe, eight or nine at a time.

Q. If the record reflects something different from that, then your recollection at this point must be impaired, or, you know, you just can't remember?

A. I don't know if it is impaired, but you remember things as you remember them, and you just have a recollection that the Sheriff would be coming in and out all the time while this was going on. We would recess for a few minutes and have a discussion with the Judge, and the Judge would say, "Well, go get some more," and so, maybe, it is eight or nine times that the Sheriff was in and out of the courtroom, at which this matter was discussed, but I didn't keep a box score on it, as I recall.

Q. As you indicated, you appeared on Mr. Yount's [63] behalf at some of these pardon board hearings, etc.; is that correct?

A. That is correct.

Q. And, in fact, indicated that, all except for one, you believe you appeared at, and that is because you were in trial somewhere.

A. One, I remember definitely, I was not there, and I couldn't be there because I was some place else, and I remembered writing a letter or something to his probation officer or something about that, and I have a recollection about that, but I don't recall exactly what year or what time or anything specifically.

Q. And you are appearing on his behalf, at his request; is that right?

A. Yes.

Q. To speak for him with regard to the pardons?

A. Yes.

Q. Now, let me clear up something. You didn't appear as his counsel, the pardons board counsel did that; but you were there as a friend of Mr. Yount's or a former attorney of his?

A. As a former attorney and a friend, too, I came to know Jon over the years, in my representation of him,

and, although prior to this trial I never knew Jon and he never knew me, but I considered him in the friendship [64] category.

Q. And you have indicated that, through the correspondence, etc.—are you still corresponding with him today?

A. Oh, I think we have exchanged, maybe, two or three letters a year or something, usually in relation to the pardon board. I have not corresponded with him in connection with this proceeding. It is a matter of him telling me when the pardon board is going to be there, and if he has a petition filed, and he is asking me if I would be in town and be available at that time, and I would answer that letter and say yes I would or I wouldn't. That would be the extent of it.

Q. Now, with regard to your recollection—and we have already gotten into the fact your recollection doesn't accord with that of Judge Cherry. You are very adamant you are correct.

A. I am sure Judge Cherry will be just as adamant he is correct, knowing him as I do, and I will not criticize him for that, and I am sure he will not criticize me for what I have said.

MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher?

Redirect Examination

BY MR. SCHUMACHER:

[65] Q. On cross-examination, you were asked questions about an affidavit you filed in a motion for a

change of venue. I show you a copy and ask you to examine that document to refresh your recollection.

A. Well, it is my signature, and I have a recollection of dictating this, and I think this is one of the documents that we probably had prepared in Mr. Blakeley's office in Clearfield.

Q. Now, in submitting that affidavit to the Court, you attached numerous newspaper articles to it; is that correct?

A. That is correct.

Q. Now, when you affirmed that those newspaper articles appeared in various newspapers in Clearfield County, did you also affirm to the accuracy of the contents of those newspaper articles?

A. Oh, no. No.

Q. And, more specifically, sir, I call your attention to—excuse me. P-1-MM, that corresponds to the exhibit admitted in evidence referring to an article appearing in the Courier Express, November 5, 1977. I would ask you to examine the reference with respect to the number of people in the courtroom.

A. (Examining document) I have read it.

Q. Now, is that what you affirmed to the Court [66] as accurate, or is that what the person that wrote the article said took place on that specific day?

A. Well, that is obviously the statement of Sally Moyer, a staff writer, whoever that is. That is Sally Moyer's statement. That is not my statement. My affidavit is merely calling the Court's attention to the publicity that the case is being given and the fact that it is mentioned in the newspaper. What the newspaper says about

it is another matter. I am not in any way ascribing or confirming what the newspaper people are saying, but any similarity between what was going on and what they say would be strictly an accident.

Q. You were asked, on cross-examination, concerning your challenge to the array; do you recall that—

A. I do.

Q. —testimony? Following that successful challenge, how were additional jurors then selected, if you can recall?

A. You mean the additional prospective jurors?

Q. Yes, sir. Were they selected from the wheel, or did the Sheriff go out and find other people, or what took place?

A. My recollection is they were not selected from the jury wheel, that the Sheriff was instructed by Judge Cherry to go out and find jurors, in accordance with the [67] established rule in Pennsylvania, to go out and collar the first people that he ran into on the street that were over the age of 21, and able to read and write, those being the only qualifications for being a juror in Pennsylvania at that time.

Q. Excuse me. Are you finished?

A. No. I was just going to say I did not go with the Sheriff when he went out and did this, but I was there when Judge Cherry instructed the Sheriff how to go about doing it, and so I must assume that the Sheriff did as he was told.

Q. But I am referring to after that panel was successfully challenged by you, and additional prospective jurors were selected. Do you recall how that took place?

MR. BELL: Your Honor, I believe he has already answered that question, in that he believes the Sheriff was told to go out and pick people off the street, once again, with the qualifications that they be 21 and able to read and write and whatever.

THE COURT: Haven't we been through this?

MR. SCHUMACHER: Yes, sir. I have no further questions, Your Honor.

THE COURT: Mr. Bell?

MR. BELL: Just briefly.

Recross Examination

[68] BY MR. BELL:

Q. As to these articles of Sally Moyer's and some of the other newspaper people, you indicated you had placed those in your affidavit to show the publicity the trial was getting, as opposed to the accuracy of what they say; is that right?

A. That is right. I don't have any recollection of what the articles say, except as I would read them right now.

Q. Yes. Do you have any reason, at this point, to doubt the accuracy of Miss Moyer's representations in there, that you know at this point?

A. Yes. I have reason to doubt it, because that is not my recollection, and the thing I am talking about and you are talking about in this affidavit is that, on the November 3 issue, the Court expressed—now, they go and they say Yount was convicted of the rape-murder of Pamela

Sue Reimer. Every time they get a chance, they throw in the word, "rape," even though the Supreme Court has said there wasn't any rape, and this is being published on the eve of the second trial, and that is what is bad about it, and this is what is extremely prejudicial, and this is what I am objecting to, and they never refer to it as just Mr. Yount's murder trial, it is always his rape-murder trial. And look at the next one, here, Tuesday, November 3: "Yount trial [69] jury selection set. We had the trial of Yount on charges of first degree murder and rape once. This is the second trial." Nothing could be further from the truth. There was no trial on rape, the second time, and this is what they were doing all the time, and this is what I was complaining about, and I am still complaining about it today. It is very unfair. Every one of these articles, they do that, and they all keep talking about rape, and there is no rape now, and this is what I am complaining about or was complaining about then.

Pardon me. I didn't mean to raise my voice.

MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher?

MR. SCHUMACHER: No, sir.

THE COURT: Okay. Thank you very much, Mr. King.

(Witness excused.)

THE COURT: I think we might as well break here for lunch. Supposing we resume at 1:30.

(Court was recessed for luncheon, to reconvene at 1:30 p.m. o'clock the same day.)

[70] Afternoon Session

THE COURT: Mr. Schumacher, do you want to continue, please?

MR. SCHUMACHER: Yes, sir.

Mrs. Yount, take the stand, please.

CAROLINE YOUNT, called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

THE WITNESS: Mr. Schumacher, you will have to talk a little louder. My one ear, today, I can't hear too well out of it.

Direct Examination

BY MR. SCHUMACHER:

Q. State your name for the record, please.

A. Mrs. Caroline Yount.

Q. And where do you live, Mrs. Yount?

A. R. D. 2, Dubois.

Q. And that is located in Clearfield County?

A. That is right.

Q. How long have you lived in Clearfield County?

A. Well, sixty years.

Q. And your son, Jon Yount, is the petitioner in this case; is that correct?

A. That is correct?

[71] Q. And did you live in Clearfield County in 1966?

A. Yes.

Q. And you lived in Clearfield County when the death of Pamela Sue Reimer occurred?

A. Yes.

Q. Have you followed the case involving your son and the death of Miss Reimer since that time?

A. Yes, I have.

Q. Have you followed the publicity in the newspaper?

A. Yes.

Q. Have you followed any publicity that existed in the radio and television stations?

A. Yes, radio and on television.

Q. Now, referring to the first trial that took place, you heard the testimony about the various newspaper articles that were already introduced in evidence, so I won't repeat that. Was the case also followed on the radio?

A. Yes.

Q. How did the radio broadcast of the news correspond with the newspaper account?

A. It was identical. The Gray Printing Company, they own the Courier Express, and they own the WCED, and it was identical. They own the both stations.

[72] Q. So if something ordinarily was in the newspaper, would it also be on the radio?

A. That's right; um-hum.

Q. How many radio stations are there in Clearfield County, if you know?

A. Well, one in Clearfield, and we have two in Dubois, now, we have WDBA and WCED in Dubois.

Q. How about in 1966?

A. Clearfield had one and Dubois had one, at that time.

Q. Did the Clearfield radio also cover the news?

A. Yes, very much so.

Q. How about the television station?

A. Well, I don't know too much about that. It was on the news. We were over at the hearing, and it was on the news. When we would come home, we would turn the news on, WJAC, that is Johnstown.

Q. You were in the courtroom when there was testimony about the number of people in the courtroom at the first trial. Would you tell the Court whether or not there were a lot of people in the courtroom or a few or how many during the first trial?

A. Oh, it was packed, and they were packed out in the hall, and, when Jon got up to testify, they had the doors closed, but, when he got up to testify, they opened [73] the door, and it was crowded, the hallways were crowded.

Q. The day the verdict of guilty was pronounced by the jury and he was sentenced by the Court, was there a crowd of people in attendance then?

A. Yes.

Q. Was the courtroom full?

A. No, I don't think it was full.

Q. Were there people outside the courtroom after the hearing?

A. Yes; the first trial?

Q. First trial.

A. Um-hum.

Q. Large group, small group?

A. Large, um-hum, if I remember correctly.

Q. How about after the first trial, did you continue to read and hear about the case?

A. Well, you couldn't help—every paper you picked up, there was something in about it.

Q. Besides what you saw in the newspaper or heard on radio and television, were the people of Clearfield County talking about the case, as far as you knew?

A. Everyone, practically everyone; yes. It was big news, at that time.

Q. Now, you recall the reversal of your son's conviction by the Pennsylvania Supreme Court; do you remember [74] that?

A. Yes. That was also in the paper.

Q. Were people talking about it?

A. Yes.

Q. Was it a matter of common discussion among people in the community or not?

A. Yes. Anything that pertained to Jon—well, on account of the paper, it had inflamed the people in Clearfield County.

Q. How about the second trial? Was that also a matter of discussion among people?

A. Yes.

Q. And you continued to read about it in the newspaper?

A. Yes, I did.

Q. And hear about it on radio?

A. Yes.

Q. Television?

A. Yes.

Q. And did that continue through the selection of the jury and the trial?

A. In the paper, it did, but I don't know about on television, but I know it was in the paper.

Q. What about the number of people that were usually in the courtroom during the second trial? A few?

[75] A. No. It was filled, but not as many as the first trial.

Q. How many days were you in the courtroom during the voir dire selection, before the second trial?

A. I think about two, two times, two days.

Q. On those two occasions, how many spectators do you recall were in the courtroom?

A. Well, there was a good many.

Q. How many is a good many, one, five, ten?

A. Oh, I would say 25.

Q. Did you attend the trial of the second case?

A. Oh, yes, every day, um-hum.

Q. Were there many spectators in the courtroom during the second trial?

A. Yes, um-hum.

Q. Every day?

A. Every day.

Q. How many?

A. Well, I don't know, but there was a good many.

Q. How many is a good many?

A. Well, I was so confused at that time, you know, but I looked around, and, oh, I would say it was practically full.

A. You were present, and other relatives of Mr. Yount were present; is that right?

[76] A. That's right; um-hum.

Q. Now, who did those relatives normally include?

A. Well, my husband and my daughter.

Q. His wife?

A. And wife, yes, and cousins and nieces and nephews.

Q. Were there relatives—

A. Or cousins, rather, to Jon, but nieces and nephews to me.

Q. Can you hear my voice okay now?

A. What?

Q. Can you hear what I am saying?

A. Yes, fine.

Q. I don't know how long it is going to last.

THE COURT: Do you want to move over?

MR. SCHUMACHER: Some of the judges insist you stay at counsel table, so that is why I was here.

THE COURT: If you want to take a chair over there—

MR. SCHUMACHER: This is okay.

BY MR. SCHUMACHER:

Q. Were there relatives of Pamela Sue Reimer in the courtroom?

A. Yes, um-hum.

Q. And were there newspaper reporters?

[77] A. Yes. They were up at a table up front.

Q. Was that table in the body of the courtroom, as were defense counsel and the district attorney?

A. Yes, um-hum.

Q. Was it the same during the first trial?

A. Yes, no different.

Q. Do you know whether or not there were people present who worked in the courthouse?

A. Well, yes. They had a woman there all the time.

Q. I mean spectators. Were you familiar with any spectators in the courtroom, that might have worked in the courthouse?

A. Well, I really don't know if they worked in the courthouse or not.

Q. But there were people there you didn't know?

A. Oh, yes, a lot of people I didn't know.

Q. And did that normally occur, every day?

A. Every day.

Q. Now, after your son was convicted the second time, did the publicity die down?

A. No.

Q. Did people continue to talk about the case?

A. Yes, they did. Well, how could they help it, when it was in the paper, and Mr. Morgan had it in, "If you [78] want to keep John Yount in prison, send a letter to me." He had his address.

Q. Who is Mr. Morgan?

A. He is sitting right there.

Q. The District Attorney?

A. Yes, the D.A.

Q. Of Clearfield County?

A. Yes.

Q. When did that occur?

A. Why, whenever John would come up for parole, this occurred

Q. Was there any other community interests in either opposing or encouraging your son's chances for parole?

A. Well, they had petitions in the churches, in the stores, in the mall, not far from where I live, and in beer gardens, which I felt very bad about, to think that they would have to have petitions in beer gardens.

Q. Petitions for what?

A. For to sign against John.

Q. Against John getting what?

A. Parole.

Q. I will show you what has been marked for identification Plaintiff's—or Petitioner's Exhibit No. 3, and I would ask you to tell the Court what that is.

A. Yes.

[79] Q. What is that?

A. This was put up in the Fashion Bug, in the mall, in Dubois.

Q. It is a picture of something.

A. It was, "Please join Yvonne Reimer, Fashion Bug, and our community in keeping John E. Yount, murderer, behind bars. Please sign below. Thank you." Now, this is the kind of things that has been in our town, and I think it is terrible. Who do I give this—

MR. SCHUMACHER: Thank you.

I offer the exhibit into evidence, Your Honor.

THE COURT: Any objection?

MR. BELL: We would object as to the foundation. It hasn't been indicated when that was, who took the picture, etcetera.

MR. SCHUMACHER: I will qualify it.

BY MR. SCHUMACHER:

Q. Do you recall when you saw that poster in the window?

A. Well, I didn't see it in the window.

Q. Who did?

A. Why, this man took—went down and took a picture of it and brought the picture to me.

Q. When?

A. Well, the last parole, when he was up for his [80] last parole.

Q. When was that?

A. That was in June, but it was before that. I would say—oh, let's see—June— around April.

Q. Of this year?

A. No, 1980.

Q. Do you know whether or not the sign was in the window?

A. It wasn't in the window, it was right out in the mall, when people went by and—

MR. BELL: Objection, Your Honor. She said she had no personal knowledge of this, so I don't see how she can testify as to where this was.

THE COURT: Mr. Schumacher, would you clarify that, please?

BY MR. SCHUMACHER:

Q. Did you ever see the picture, wherever it was?

A. No, I never did, but this was given to me, and it was in—and I not only saw the picture, but there wasn't one person but there was a hundred told me that was down in the mall.

Q. Are you aware how many petitions were signed opposing your son's release on parole?

A. Why, this gentleman said 10,000.

[81] Q. Which gentleman?

A. This one right here. I don't know what his name is. (Indicating.)

Q. The counsel for the Commonwealth in this case?

A. Yes.

Q. Mr. Bell?

A. Yes, um-hum. He got up in front of the Parole Board, and that is what he said.

Q. When was that?

A. That was in June.

Q. Of 1980?

A. Um-hum.

Q. Were other such petitions from Clearfield County presented to other parole boards, over the course of the years?

A. Not that I know of, because we have had a good many murders in Clearfield County, and you didn't hear too much about them. It was in the second page, and then very small.

Q. I am talking about any other petitions relating to your son. Are you familiar with any other petitions in Clearfield County opposing his release?

A. Yes. Over in Clearfield, there was a good many in the town of Clearfield. No doubt these young men [82] know about it.

Q. Where would those have been circulated?

MR. BELL: Objection, Your Honor. Once again, we are going for hearsay. If she knows, she can testify.

BY MR. SCHUMACHER:

Q. Do you know where it was circulated?

A. Yes. One was at the diner, and one was at the mall over in Clearfield.

Q. Did you ever see any of them, yourself?

A. No, not over there.

Q. Did you see any anywhere?

A. No. Naturally, they wouldn't want me to sign it, if they knew who I was.

MR. SCHUMACHER: I have no further questions, Your Honor.

THE COURT: Mr. Bell?

MR. BELL: Thank you, Your Honor.

Cross-Examination

BY MR. BELL:

Q. Now, Mrs. Yount, you have indicated, back at that time that all this occurred, there was one radio station in Dubois and one in Clearfield; is that correct?

A. Yes.

Q. And I believe the stations were—both of them were owned by the publishers of the newspaper in the [83] different areas.

A. No, I don't know about Clearfield, but Dubois I do know.

Q. I believe Mr. Ulrich owned both the Clearfield paper and the Clearfield station. It is your testimony that, with regard to the reporting on the radio, basically, that indicated what had been in the paper that day?

A. That's right.

Q. Now, do you subscribe to the Dubois Courier Express?

A. And have ever since we have lived in Clearfield County.

Q. How long have you lived in Clearfield County?

A. Sixty years.

Q. The Dubois Courier Express, that is distributed just in the city of Dubois?

A. No. I live out in R.D. 2, and I get the paper every day.

Q. So it is disseminated outside of the city of Dubois?

A. Yes.

Q. Do you happen to know whether that newspaper goes to any other counties?

[84] A. Yes, Jefferson County, I am quite sure.

Q. How about Elk County?

A. Elk County, yes.

Q. So the distribution figure we have admitted here on—the Public Defender's Office admitted—represent papers that may have gone into Elk County, Jefferson County and Clearfield County.

A. I assume they do, because Elk County is not too far, and I know Penfield is—Penfield and Weedville, they are in Elk County.

Q. We are dealing with an area where we are right on the borderline?

A. Yes, and they get the Courier, or they distribute it down there.

Q. Now, you indicated, I believe, with regard to Mr. Morgan, that there have been things in the paper indicating that he was soliciting people to send things.

A. He certainly was, yes. I have the clippings.

Q. Do you have them here with you today?

A. No, I don't have them today.

Q. Do you recollect exactly what those clippings say?

A. Yes. Anyone opposed to John Yount's parole, would they—and he gave his telephone number, and he gave his address.

[85] Q. Was that put in by Mr. Morgan, or do you know?

A. No. Who else would put it in?

Q. Was there a reporter's byline underneath it? Do you happen to know whether Mr. Morgan called up and said, "Put this in," or otherwise?

A. I don't think the Courier would put things in unless they are advised to do so; do they?

Q. So, to your knowledge, there is just this article in there, to write to Mr. Morgan; you don't know whether Mr. Morgan actually put that in?

A. Yes, my own feeling, I think he did.

Q. You feel he put it in, but you don't know?

A. Well, reading is believing—not everything, but a thing like that, I think it would be.

Q. Did—

A. Who else? His name was to send that to Mr. Morgan.

Q. He is the District Attorney of the County; is he not?

A. I know he is, and I thought it was very small.

Q. He is the official who would handle such things; is that correct?

A. What?

[86] Q. He is the official who would handle such things; is that correct?

A. Yes.

Q. What I am getting at is, you don't know whether he called the paper and said, "Put this in"?

MR. SCHUMACHER: Objected to as asked and answered.

THE WITNESS: I don't know how I would know that.

BY MR. BELL:

Q. Okay. Now, with regard to the petitions, you indicated he had presented 10,000 petitions or names to the board last time; is that correct?

A. Yes. I was there.

Q. Now, that was June of this year, 1981; is that correct?

A. No, June of 1980—or was it '81?

Q. Eighty-one, this past June?

A. The past—that's right.

Q. I just wanted to clear that up.

A. His last parole.

Q. Yes.

A. Yes.

Q. Now, during the period of time since the second trial, you have indicated you have resided in Dubois?

[87] A. Yes. I have never lived anywhere else.

Q. Okay. And have you traveled throughout the Dubois area communities and Clearfield County area?

A. Yes.

Q. Have you traveled around those areas during these times the petitions were supposedly floating out and about, for the people to sign?

A. Yes. Well, I am over in Clearfield quite a lot, and—yes.

Q. And did you ever see one of those petitions, or did anyone ever approach you?

A. No, I have never seen one, but people has called me on the phone, and they have told me about the petitions being circulated.

Q. Now, you indicated that there was a lot of publicity during the time of these particular trials and in between; is that correct?

A. Oh, yes.

Q. Now, since the time of the second trial, and I guess that went up on appeal, etc., has the publicity died down, to some extent, other than the pardons hearings, as they come up every year?

A. Well, I haven't heard it mentioned too often, only when it comes up for parole.

Q. And each time that comes up, there is something [88] in the paper?

A. Yes, there is something in the paper, yes, and I think it comes from Clearfield.

Q. Do you happen to know when Mr. Morgan was elected District Attorney? Do you have any knowledge?

A. Yes, because I work on the board.

Q. Okay. When was that?

A. Was it three years ago Mr. Morgan ran?

Q. Okay. Was Mr. Morgan District Attorney at the time that John was tried—Mr. Yount was tried, your son—or was Mr. Reilly the District Attorney then?

A. Yes, he was the D.A. then, Mr. Reilly.

Q. So Mr. Morgan got the position some time after the trial?

A. Yes, um-hum, that's right.

Q. Would '75 sound right as to when Mr. Morgan was first elected to the position, if you know?

A. Let's see. No, this is his second term— isn't it? I don't know. I think he was in before that.

MR. BELL: No further questions.

THE COURT: Mr. Schumacher, anything further?

Redirect Examination

BY MR. SCHUMACHER:

Q. Was there anything in the newspapers about this case in Federal Court?

[89] A. Yes, two articles in about it, about him and about—they were having him up for—what is it, the Miranda case?

Q. Whatever, you read articles in the newspapers about this hearing and this case pending in Federal Court?

A. Yes, I did, two different times, and that it would be held November 3 in Pittsburgh, and—

Q. I show you what has been marked as Plaintiff's Exhibit 5 and ask you to tell the Court what that exhibit is.

A. Well, this here is, "Will Oppose John's Petition at November 3 Hearing," and "Yount Challenging State Conviction in Federal Court."

Q. Are they the two articles you are referring to?

A. Yes, they are the ones that were—yes.

MR. SCHUMACHER: Those articles appeared in the Dubois Courier Express, Tuesday, October 6, 1981—

THE WITNESS: No, there hasn't been—

MR. SCHUMACHER: —and the Dubois Courier Express, Saturday, October 10, 1981. I offer them into evidence, Your Honor.

MR. BELL: No objection, Your Honor.

THE COURT: Okay. We will admit them.

(Petitioner's Exhibit No. 5 was received in evidence.)

[90] MR. SCHUMACHER: I have no further questions.

THE COURT: Anything further, Mr. Bell?

MR. BELL: Nothing further.

THE COURT: Do you want to step down, then, Mrs. Yount?

(Witness excused.)

CLAIR CLYDE, called as a witness by and on behalf of the Petitioners, was duly sworn.

MR. BELL: Your Honor, could I have an offer on this? If it is going to be the same as Mrs. Yount, I could stipulate to the publicity.

MR. SCHUMACHER: Only she saw one of the petitions—she saw the petitions being circulated, that Mrs. Yount didn't, and, in addition, she would testify to an incident that occurred at the local church, where a prayer group was discussing the matter and was opposing the release of Mr. Yount.

THE COURT: Now, this is all post-conviction?

MR. SCHUMACHER: Post-conviction, just to show the publicity continued all the way up to the present.

THE COURT: Can we get a stipulation that, whenever Mr. Yount comes up for a parole hearing, that there is parole publicity?

MR. BELL: I will stipulate whenever Mr. Yount [91] comes up, there is an article in the paper,

and petitions have been presented to the board with regard to opposition.

THE COURT: Is that satisfactory, Mr. Schumacher?

MR. SCHUMACHER: Yes, sir.

The next witness for Mr. Yount will also confirm the fact that publicity has occurred from the time of the initial incident involving the death of Pamela Sue Reimer, through the present time, including, as previously stipulated, the parole hearings, and, in addition, as to the particular community attitude, where there is a constant discussion concerning Mr. Yount, in opposition to his release from prison. Her name is Connie Ives.

THE COURT: Can Miss Clyde step down?

MR. SCHUMACHER: Yes.

THE COURT: He wants you to step down. Thank you.

(Witness excused.)

THE COURT: Mr. Bell, can you enter into any stipulation?

MR. BELL: With regard to that, once again, we will stipulate to that. The only objection I would have is "constant publicity." Every time the petition is presented, it does arise. We would stipulate to that point, but, as to "constant"—

[92] THE COURT: "Constant," at this time?

MR. BELL: Yes, at this time.

MR. SCHUMACHER: I would prefer to call the next witness, Your Honor. My client desires to have her testify.

THE COURT: Okay.

CONSTANCE IVES, called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SCHUMACHER:

Q. State your name, please.

A. Constance Ives.

Q. Where do you live?

A. R.D. 2, Dubois.

Q. How long have you resided in Clearfield County?

A. Since September of 1976.

Q. What is the nature of your occupation?

A. I am a medical technologist.

Q. And so, since you didn't reside in Clearfield County in 1966, your familiarity with any matters relating to the case began when?

A. In 1966, I was in Elk County, at the time, [93] working at Andrew Cole Memorial Hospital.

Q. For whom?

A. Dr. Dennis Sharkey.

Q. And so you were familiar with matters pertaining to this case back in April of 1966?

A. Absolutely.

Q. And the initial publicity that occurred following the death of Pamela Sue Reimer?

A. Yes.

Q. And were you familiar with the publicity that occurred concerning the trial, the first trial?

A. Yes, very much so.

Q. And the second trial?

A. Yes.

Q. Now, that publicity has been discussed extensively here. Were you also familiar with any discussions concerning the cases in the community?

A. Yes, several. One, in particular, my former father-in-law was called to possible jury duty in the second trial, and I remember quite vividly him leaving, that morning, to go over to the courthouse, and, at the time, my sister-in-law, at the time of Pamela Sue's death, was also a student at Dubois High School, and there was great animosity on his part towards the whole situation, and he was a prospective juror, at the time.

[94] Q. And, at that period of time, were there conversations concerning Mr. Yount?

A. Yes.

Q. And were you personally familiar with those conversations?

A. Yes.

Q. And were those conversations negative to him?

A. Definitely. Most definitely.

Q. And did the attitude in the community pertaining to Mr. Yount end with his conviction, following the second trial?

A. Yes. It is still regarded, to—again, to the people that I have conversed with personally, as rape-murder or murder and, again, animosity toward him, in general.

Q. When you refer to still regarded as rape-murder, do you mean the first case?

A. No, I mean the second—I mean the negative opinion is still—it does not seem that anyone has realized the rape has been dropped from the charges.

Q. So throughout the second trial, the attitude of the community was that he was still being tried for a rape?

A. Definitely.

Q. And is it your testimony that the attitude of the community continues up to the present time in that regard?

[95] A. Up to three weeks ago, the last conversation I had, yes.

Q. Are you familiar with any petitions that have been passed around in Clearfield County to be signed by people, opposing the release on parole of Mr. Yount?

A. Yes. There was one at Nelson's grocery store in Oklahoma, which is towards the mall in Dubois, and I specifically signed the petition, saying I think John Yount should be freed immediately, and I think I messed up half of their petition because I signed it that way. It was about, I would say, a little over half full at the time.

Q. I don't know whether I asked you—are you related to Mr. Yount?

A. No, I am not.

Q. Do you know whether—what was your father-in-law's name?

A. Homer Ives, Sr.

Q. And he was a prospective juror at the second trial?

A. Right.

Q. Do you know whether or not he was challenged for cause or preemptorily or what?

A. The only thing I can tell you is he was not on the jury. Exactly what ensued at the courthouse, I don't

remember—I don't remember what he said when he came [96] back home. All I know, he was not accepted for jury duty.

MR. SCHUMACHER: Nothing further, Your Honor.

THE COURT: Thank you, Your Honor.

Cross-Examination

BY MR. BELL:

Q. Do you know John Yount personally?

A. I met John once in my life, and that was in August of this year.

Q. And on what basis was that meeting?

A. I went down to the Camp Hill Prison.

Q. For what purpose, if I might ask?

A. I was invited by his mother to go down to a picnic.

Q. So you went down with his family, more or less?

A. Exactly.

Q. Now, you indicated you reside in R.D. 2, Dubois.

A. That is correct; yes.

Q. Exactly where do you reside?

A. In Farmview Trailer Court, or Cebula, depending on which—

Q. And where is that in relationship to where Mr. Yount's mother lives?

A. She lives on 255, which is—I don't know, a [97] couple of miles from my house.

Q. Now, your father, as you indicated—

A. Father-in-law.

Q. —father in law, excuse me—was called for jury duty; is that correct?

A. Yes.

Q. Was he selected for that jury?

A. I have—no, he did not serve on the jury. No. He was a potential juror.

Q. Okay; but he was not selected?

A. No. I already stated that.

Q. Now, you have testified that there were petitions. You indicated one at Nelson's grocery store in Oklahoma; is that correct?

A. Yes.

Q. Were there any petitions circulated indicating that people favored John Yount, to your knowledge?

A. Yes, there was one. There was an article in the paper, in the back of the paper, opposing the front part of the paper where everything had been put in previously, okay, that anyone who was in favor of John—and this was the only and the first time it had ever been in the paper—that anyone who favored his release, to write.

Q. And who did they write to?

A. I believe it was to a person.

[98] Q. Rev. Swanson perhaps—Swede Swanson?

A. It could be, yes.

Q. So, most recently, we have had petitions floating on both sides; is that correct?

A. Very recently, one.

Q. Do you happen to know whether that petition in favor of Mr. Yount was presented to the pardons board?

A. I have no idea.

MR. BELL: I have no further questions.

MR. SCHUMACHER: I have nothing further,
Your Honor.

THE COURT: All right. Do you want to step
down?

(Witness excused.)

MR. SCHUMACHER: Mr. Wade.

JAMES V. WADE, called as a witness by and on behalf
of the Petitioner, having been first duly sworn, was
examined and testified as follows:

MR. BELL: Once again, may we have an of-
fer?

THE COURT: Let's first have the witness
identified.

Direct Examination

BY MR. SCHUMACHER:

Q. Would you state your name?

[99] A. James V. Wade.

Q. Occupation?

A. I am a law clerk investigator for the Public De-
fender's Office.

Q. And in such capacity, did you conduct an in-
vestigation relating to the presentation of this case?

A. Yes, I did.

Q. Did that investigation include an attempt to
secure from various radio stations broadcasts pertaining
to either the 1966 or 1970 trials of the Yount cases in
Clearfield County?

A. Yes, it did.

Q. Explain—

THE COURT: Mr. Bell, does that satisfy?

MR. BELL: That satisfies me.

THE COURT: Okay.

BY MR. SCHUMACHER:

Q. Explain to the Magistrate what you were able to find or not find and why.

A. Well, I—first, I will go by the radio stations. I contacted Dubois radio station and the Clearfield radio station. The Dubois radio station is WCED, and the Clearfield radio station is WCAT, I think. I may be wrong on that.

Q. T-A.

[100] A. T-A. They explained to me that the records of a radio station are not normally kept for very long. While one radio station tried to keep their news scripts for about a year and the other radio station maybe for a week, they do make attempts to file important, maybe, historic things that happen in the county on file. But a flood in the Dubois radio station had wiped out all their records of such a monumentous event, and, therefore, they didn't have anything regarding the Yount case, because of the temporary nature of their—of what was left from the radio station, and the same was true for the Clearfield station. They both, however, indicated to me that a good barometer of what appeared in the local newspapers also would appear—would have appeared in the shortened version in their newspaper.

MR. BELL: Objection, Your Honor. I think that is hearsay. He indicated that they indicated to him.

THE WITNESS: Well both—

MR. SCHUMACHER: It is merely offered for the purpose of explaining to the Court why we are—

THE COURT: Okay. Go ahead.

BY MR. SCHUMACHER:

Q. The end product is, you are not able to produce for Magistrate Mitchell any radio transcripts of broadcasts that occurred relating to this case; is that [101] correct?

A. That is correct.

Q. You also conducted an investigation relating to newspapers in Clearfield County; is that also correct?

A. That is correct.

Q. Now, for one of the newspapers we were able to secure, you were able to secure copies of the newspapers that are legible and the Court can read, but I would like you to explain for Magistrate Mitchell why the other copies are so illegible.

A. The legible copies—the papers, since they are so old, have been reduced to microfilm and are shown on a screen, and it is hard to copy those, the microfilm. It takes a special process, and the copies that you will not be able to read are copies of this microfilm that is old.

Q. Are they like, then, negatives, rather than the actual pictures of the various articles?

A. Right.

Q. And in order to provide the Court with a summary of what was printed in the two newspapers, what did you do?

A. We had—we hired people that worked for the newspaper to go through the past papers on their machine. They had access to the machine, and they went through and provided a report on the title of the article, [102] the page number of the article, the paper that it appeared in and the date that it appeared, and they have been admitted into evidence as our exhibits.

Q. One and two?

A. One and two.

Q. Now, did your investigation also involve an interview with a Donna Indre?

A. Yes, it did.

Q. How do you spell that last name?

A. I-N-D-R-E.

Q. And where does she live?

A. She lives in Dubois on, I think, West Scribner Avenue.

Q. And did you issue a subpoena for her?

A. Yes, I did.

Q. Prior to the time that you issued a subpoena to her, did she give you any information relating to the matters at issue in this case?

A. Yes, she did.

Q. Did she appear willing to discuss those matters with you?

A. At first.

Q. Now, when did she seem to change her attitude, if at all?

A. After she learned that she was going to be [103] subpoenaed for this hearing.

Q. Have you attempted to contact her since the time you subpoenaed her, to ask her to be present here today?

A. Yes, I have.

Q. With what success?

A. With no success.

Q. Aren't you able to reach her, or does she refuse to come, or what?

A. She—I haven't been able to reach her on any occasion. At first, I surmised she was working, but then I called her after working hours, and the phone has been busy, and I have called her on Saturday, and the phone was either non-answered or it was busy.

MR. SCHUMACHER: Your Honor, I would like to ask you to consider the witness an unavailable witness and ask permission to question Mr. Wade concerning his interview with her.

THE COURT: Well, I think there are ways of procuring her; and she has been served with a subpoena?

THE WITNESS: That is correct.

THE COURT: Has she been instructed to appear at this hearing?

THE WITNESS: I served the subpoena to be—you know, for her to appear at this hearing, but I attached a notice to it that says, "Do not appear unless contacted."

[104] THE COURT: So she has been subpoenaed but not subpoenaed. Well, I would have difficulty finding her unavailable, at this point.

THE WITNESS: We have a statement from her.

MR. SCHUMACHER: Okay. I have no further questions.

MR. BELL: No questions.

THE COURT: Okay. Do you want to step down?

(Witness excused.)

THE COURT: Mr. Schumacher, your next witness.

MR. SCHUMACHER: I call Mr. Yount.

THE COURT: Let me just explain we are going to have to take a recess a little after three, because there has been an arrest. If anyone feels they would like to stand up and take a stretch, I would prefer to keep going.

JON E. YOUNT, called as a witness by and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SCHUMACHER:

Q. For the record, sir, would you state your name?

A. Jon E. Yount.

Q. And are you the Petitioner in this case?

[105] A. Yes, I am.

Q. Jon, how old are you?

A. Forty-three.

Q. How many years prior to your incarceration as a result of the case that is discussed here have you resided in Clearfield County?

A. All my life, 28 years.

Q. Did you go to school in Clearfield County?

A. In Sandy Township, which is an area around Dubois.

Q. Graduated from high school there?

A. Yes.

Q. Went to college?

A. Yes.

Q. Where?

A. Penn State University.

Q. And did you get a degree?

A. I received a bachelor's degree in 1958 and a master's degree in education in 1965.

Q. And what did you do for a living, subsequently?

A. I taught school at the Dubois Area High School.

Q. For how many years?

A. Eight years.

Q. What course?

[106] A. Mathematics and chemistry.

Q. Prior to the event involved in this case, had you had any prior criminal record?

Q. No, sir.

Q. And some time during 1966, you were accused of the death of Pamela Sue Reimer; is that correct?

A. Yes, sir.

Q. And you retained Mr. King to represent you?

A. Yes, sir.

Q. Now, without going into all the details of the publicity concerning the case—those matters have already

been introduced into evidence—would you tell Magistrate Mitchell what your recollection is of the publicity that surrounded the murder and the first trial?

A. When I first was confined in the Clearfield County Prison, I was locked in solitary confinement for a period of approximately three or four weeks, under the instructions that—by the turnkeys, that I was being locked there for my protection from the other inmates. Then, I had a radio, access to a radio, and there was substantial news accounts of the incident. Then, during the trial, the first trial, again I had a radio, and I had access to any of the news accounts that came over the news, and it probably made the news every hour, a typical hourly newscast, the fact that—where I was, anything that was happening in [107], the case in terms of investigations, that—and, of course, it was referred to all the time as a rape-murder.

Q. Did that include the preliminary hearing?

A. Preliminary hearing.

Q. Argument?

A. Argument.

Q. Arraignment?

A. Yes.

Q. Voir dire selection?

A. Yes.

Q. And the trial of the case?

A. Trial of the case.

Q. It covered—and describe what news media.

A. The news media on the radio, primarily. Of course, I had access to newspapers occasionally, and there were periods of time when I was allowed to be on the regular cell block population. Clearfield County was a

very small prison, at the time, and I was permitted to be on the cell block from time to time, or every two weeks or so. The warden would come in and explain to me he had to lock me up because there were some news articles in the paper, and they feared for my safety, and then the sheriff would have me locked up for a period of time, and then—I would be locked up for a matter of a week or so, and then I would be allowed to be back on the cell blocks.

[108] Q. What was your defense on the case?

A. Not guilty by reason of insanity.

Q. And the police officers testified concerning a statement that you had given; is that correct?

A. Yes, they did.

Q. And psychiatrists testified concerning your mental defense?

A. Psychiatrists and a neurologist.

Q. And you testified?

A. Yes.

Q. And that was a rape-murder case?

A. Yes, it was.

Q. And you were convicted on both counts?

A. On both counts.

Q. And sentenced to life imprisonment?

A. Yes.

Q. Describe for the Court the number of spectators that normally appeared during the course of the trial.

A. At any time that I observed—turned around, of course, to look back over the courtroom, and that was—normally, was to contact my family, I had contact with my family—there was—the courtroom was always packed, during the first trial.

Q. Covered by the news media?

[109] A. Yes.

Q. Reporters were in the courtroom?

A. Yes.

Q. How about when you testified? Do you remember what type of audience you had then?

A. Of course, that was the one time I did face the entire courtroom, and it was packed, and I could see people in the hallway, in the back, through the open doors.

Q. Do you recall what type of crowd was in attendance at the time your verdict of guilty was pronounced and you were subsequently sentenced to life imprisonment?

A. As I recall, the courtroom was fairly full; yes.

Q. Now, subsequently, your attorney indicated that he filed numerous legal pleadings on your behalf and an appeal.

A. Yes.

Q. Was that covered by the news media, or had things died down?

A. At that time, I had been transferred to the Western State Penitentiary, and the only access I had to news articles and so on, at that time, were those that were sent to me through letters, and so on, from my family. And then, later, I was transferred, in December, to the State Correctional Institution at Rockview, and I also [110] continued to read newspaper articles that were sent to me by my family, as well as some other inmates that were there from Clearfield County, who were there.

Q. Did your transfer out of Clearfield County have to do with the attitude at that time?

A. When I was sentenced—and I was sentenced immediately upon the guilty verdict being returned—Judge Cherry ordered the sheriff to remove me immediately to

the Western Penitentiary, the diagnostic center there. When we returned to the county prison, it was rather late, and I was told that I would not be transferred till the following morning because of the late hour and the darkness and so on, and that they were concerned of an incident during the dark hours. The following morning—it was just barely light—I was awakened and taken to the front of the jail. Sheriff Sharney was the sheriff at that time—was there and told me that we would go out the side door, and I was under the impression, from the activity there, that they were concerned about anyone who might be out in the front of the county prison. When I stepped out the side door—there were six steps leading down the side of the county prison—when I stepped out the side door, there were five or six photographers—I assumed they were newspaper photographers—and I was held by the arm, by the sheriff and his deputy, at the top of the steps, until [111] they finished taking their pictures, and then we proceeded down the steps, and I was taken to the penitentiary.

Q. What time of the day do you say that was?

A. No later than seven o'clock.

Q. A.M. or P.M.?

A. A.M.

Q. What day was that?

A. I don't recall the day, but it was the day immediately after I was sentenced and the verdict was returned.

Q. And then you were incarcerated where, during the pendency of your appeal?

A. Three months at the Western Penitentiary, as it was called then, State Correctional Institution in Pitts-

burgh now; and, from December of 1966 until the retrial, at the State Correctional Institution at Rockview.

Q. And your conviction was ultimately reversed by the Supreme Court of Pennsylvania?

A. Yes.

Q. And what happened then? Were you brought back to Clearfield County to stand trial?

A. When the reversal was first announced, I had anticipated coming back, but there was a long delay because of the appeal of Clearfield County, the Commonwealth, to the United States Supreme Court. During that time—and I [112] am not sure who solicited his involvement in the case, but Arlen Specter, who was the District Attorney of Philadelphia County, came into the case and took over the case for Mr. Reilly, who was the District Attorney of Clearfield, and tied my case to a triple murder homicide in Philadelphia that was being argued on the Miranda issue as well, and those two cases then were publicized, and, in fact, I am certain I have a copy of the brief of the Commonwealth. It was done under Arlen Specter's name and sent to the United States Supreme Court for certiorari, which was denied.

Q. And those proceedings were also covered by the news media?

A. Yes.

Q. And the petition for certiorari was denied?

A. It was.

Q. And then you were returned to Clearfield County to stand trial?

A. I was returned for the preliminary hearing some time in early 1970. I think it was probably in June, prior to the first change of venue hearing. When I was re-

turned, I was put in the juvenile quarters. There are two rooms in the front of the prison that is isolated from the remainder of the county jail, and I was put in there, in isolation, because, as I was told by the warden, I was put there for my own protection, because they feared for my [113] safety.

Q. How old were you at that time?

A. Thirty-two.

Q. Had the community reaction to the slaying subsided by the time your second trial proceedings were beginning?

A. I had no evidence of it having subsided from—the only contact I had was with the authorities in Clearfield County, who kept me imprisoned there, and through the newspaper and radio accounts I heard.

Q. Did you have access to a radio then, too?

A. I didn't have—I could hear it coming through the wall from the main prison, all right. I could hear a radio being played, because of a cell that wasn't too far away. I could hear the newscast and music coming through.

Q. Did you ever hear anything relating to your case?

A. Yes. On the news, the fact that I was there for a hearing, yes.

Q. Now, as the case approached trial, Mr. King filed numerous motions on your behalf; is that correct?

A. Yes, he did.

Q. And many of those motions dealt with a request for a change of venue?

[114] A. Yes.

Q. Did he ever discuss those matters with you?

A. He explained to me that he was filing those motions, yes, and that he was attempting to accumulate newspaper articles and so on to verify our allegations.

Q. Did you understand why he was filing that request for a change of venue?

A. I understood; yes.

Q. Is that what you wanted, too?

A. Yes.

Q. Why?

A. Because I didn't feel there was any way I could get a fair trial in Clearfield County, considering the fact that the County had been pretty well saturated, over the years, with evidence that would not become an issue at the second trial, and this was very detrimental to me.

Q. What do you mean by that? Explain explicitly what was involved in the first trial that wasn't involved in the second trial, that you were concerned about.

A. Well, first of all, the major issue was that I knew the rape issue was no longer going to be tried, or reasonably sure it was not going to be retried, and I certainly didn't feel the citizens of Clearfield County would wipe that from their memory. Also, the fact that I had allegedly given a detailed confession to the State [115] Police regarding the crime that had been—that was the reason for the reversal, originally, and the fact that I had taken the stand during the first trial and testified regarding my guilt, in terms of the homicide. But I just felt that, considering all of those facts, that it would be very difficult to find a jury in Clearfield County that could assume that I was innocent.

Q. Were portions of the statement that you gave to the Pennsylvania State Police suppressed by the Pennsylvania Supreme Court?

A. Yes, an oral statement, rather lengthy oral statement, and a written statement were suppressed.

Q. And those statements were reported by the news media at the time of your original trial?

A. Yes.

Q. Now, when the voir dire began for the second trial, were there people in the courtroom, or weren't there, other than the jury panel and the court personnel? Were there any spectators?

A. The first day that the voir dire began, there were approximately a hundred people in there, that were called for prospective jury duty, and, when you look at that many people in that small courtroom, it appears to be full, but, when they were sequestered, upon our motion that they be sequestered, the courtroom emptied out rather quickly, and I [116] am not so sure there was that much room in there for spectators. They may have found it difficult to find a seat when they came in and found that panel of jurors there. After that, there was a sprinkling of people throughout the courtroom, yes, and I would say that, whenever I turned around, there appeared to be 20 or 25 people, at least most of the time, around.

Q. Now, the selection of the jury and voir dire questioning took a number of days; is that correct?

A. Yes, it did.

Q. The record will reflect how many. Do you remember approximately how many?

A. Approximately eleven days, I recall.

Q. And the number of people you described, were they commonly in the courtroom on a regular basis, or was that unusual on a particular day, or what?

A. I saw a lot of the same faces, and I am not sure there weren't people who work in the courthouse, because when we began this voir dire, the Judge had ordered the doors closed, because—again, I was not part of the discussion between my counsel and the District Attorney and the Judge, but I had the impression, from discussions with my attorney, that they were concerned again for my safety, is one of the factors in keeping the doors closed, and, in fact, they had attendants stationed at the door, and, some time during the [117] voir dire, the Judge told the door attendants they were not to keep people out, that was not the intent, it was open to the public. So I am not sure what effect that had on the general public, coming into the courtroom, but, when I saw people back there, they looked like people that had jackets on and may have been hanging around the courthouse anyway.

Q. How about when the trial started? Was there as much interest in the second trial as the first?

A. I am sure the courtroom was full for the trial itself, and, in fact, there were at least one or two classes was brought into the courtroom to observe this trial and courtroom procedure, from high school.

Q. Do you recall any incident taking place during the second trial that caused the courtroom to be emptied, spectators not to be permitted in the courtroom?

A. I don't recall it being emptied, other than for—it may have been emptied at one time for a hearing that we had, a closed hearing, but I don't recall it would have been emptied for any other reason.

Q. Do you recall whether any threat was made to you during the second trial?

A. I received no threat, directly, but I do recall that there was a discussion between my counsel, and I was told

—my counsel and the Judge—that they had been warned of a weapon had been taken from a spectator, and [118] that they were concerned about the safety of not only myself, but also people in the courtroom.

Q. What happened as a result of that?

A. Well, I understand the people were being searched.

Q. Was the courtroom emptied or closed or anything like that, as far as you can recall?

A. The courtroom was not emptied, as I recall, nor was it closed, but they would be suspicious of everyone coming in, and they were checking.

Q. Now, the petition for writ of habeas corpus filed in this case was filed by you pro se?

A. Yes, it was.

Q. In other words, you weren't represented by counsel at the time you prepared it?

A. No.

Q. But, since the time of your second conviction, did you have an opportunity to examine the transcript of the second trial?

A. Yes.

Q. And did that include the voir dire questioning of the jurors?

A. Yes.

Q. Did you go over the testimony of those jurors in considerable detail?

[119] A. Yes.

Q. Now, there are many figures set forth in the petition you filed. To the best of your knowledge, are those figures accurate and correct?

A. Yes, they are.

Q. In other words, you have called Magistrate Mitchell's attention to the fact that certain witnesses—certain jurors testified that they had fixed opinions of guilt or innocence.

A. Yes.

Q. How did you arrive at that conclusion?

A. Rather a laborious process, but I went through the entire voir dire and wrote down the juror's name, as they were being examined, their locale, in terms of Clearfield County, because I wanted to be sure that there was an even representation of Clearfield County, and whether or not they had fixed opinions, whether they had read newspapers, or stated that they had, testified that they had, heard newspaper accounts, radio accounts, television accounts, and so on. But I went through each one, kept a checklist, and tried to calculate a percentage of how many of those had declared to have fixed opinions.

MR. SCHUMACHER: Will you stipulate to this exhibit, for whatever purpose the Court deems necessary? It is Petitioner's Exhibit No. 4, which is a map of Clearfield [120] County, Your Honor.

BY MR. SCHUMACHER:

Q. I show you what has been marked Petitioner's Exhibit No. 6 and ask you what that is.

A. (Examining document) This is a listing of all the jurors, prospective jurors, who were processed through voir dire during my second trial, and it contains an indication on here of the area that they were from—Clearfield, Dubois, Curwensville, and all of the smaller towns—as well as the page number on which their testimony began, and also indicating which ones were preemptorily chal-

lenged by the defense, which ones were preemptorily challenged by the Commonwealth, which ones were challenged after the—after they were seated as jurors, after the preemptory challenges were exhausted. And, also, I drew a little square around those who ultimately became jurors.

Q. And is this an example of the procedure you used in studying the transcript of the voir dire, that you used to submit the figures to Magistrate Mitchell?

A. Yes, it is. There was a second page to that, but that does not include all the smaller towns. There was a second page to that. It was much more detailed on the second page than that, but that does generally describe the procedure I used.

Q. And does that accurately reflect what appears [121] in the transcript of the voir dire proceeding?

A. It accurately reflects all questioned jurors, except two. One was a witness and was to be a witness at the second trial, and so he was dismissed as soon as his identity was learned, and the other one had a medical problem—I believe it was asthma or something like that, and her condition was evident, and so the trial judge dismissed her immediately.

Q. I will show you what has been marked for identification as Petitioner's Exhibit No. 7, and I would ask you to tell the Court what that exhibit is.

A. This is a continuation of what was marked as Exhibit 6, and this identifies the prospective jurors who came from much smaller areas, smaller towns, but it was done at the same time Exhibit 6 was done, and it was done in the same manner.

Q. And does that accurately reflect what appears in the voir dire transcript?

A. Yes, it does, and it also includes the number of jurors, on the first page, that was examined in each of the jury panels.

Q. And is that the second sheet that you previously referred to, when I showed you Exhibit No. 6 and you said there were really two sheets to it?

A. It is.

[122] MR. SCHUMACHER: I offer the exhibits in evidence, Your Honor.

MR. BELL: Your Honor, at this point, since I have not had a chance to check that and compare it to my sheets, I think the record will speak for itself whether the people were preemptorily challenged or not, but we will agree he used the records of the court and he arrived at that.

THE COURT: All right. The records are here, and they will speak for themselves, but they will be admitted.

(Petitioner's Exhibits Nos. 6 and 7 were received in evidence.)

BY MR. SCHUMACHER:

Q. Of course, you were present in court when Mr. King—when the voir dire questioning of the jurors took place.

A. I was.

Q. And you heard the testimony of the various people when the selection procedure occurred; isn't that correct?

A. Yes.

Q. Now, from the charts that you have prepared, some of the jurors expressed certain opinions that were relevant either to you or to Mr. King or both of you, in exercising challenges and so forth; is that also correct?

[123] A. That is true.

Q. Now, explain to the Court the significance of that, as it relates to your petition for writ of habeas corpus.

A. Well, it was obvious that almost all jurors who were—prospective jurors who were examined during voir dire had had contact with media coverage of these cases or through the discussions, and had opinions, so it became a matter of trying to weed out or weed in those who had the least strongest opinion and hoped that you could get a fair trial from those, so that, when it became evident, when we went through this voir dire, that so many people from throughout Clearfield County had been exposed to this publicity and had fixed opinions, then we had to decide we would take this juror, even though there was no way in the world we would take him anywhere else, and Mr. King would say, "What do you think of this guy," and I was concerned about the way they were answering questions, because they obviously had some opinion, and there was only one, I think Juror No. 4 had not even been in the area at that time, who I really believe did not have an opinion in this case, and he had been in Ireland or someplace when this happened. And he asked me what I thought about these people, and I was concerned about all of them, and his answer was, "This is probably about as good as we are going to get, and these [124] people may be somewhat educated and understand the issues of the case, and we have to take a chance on somebody." That was his substantial explanation, "We have to take a chance on somebody, because it doesn't look like we will be able to try this case anywhere else."

Q. From what you heard, do you feel you were able to select a fair and impartial jury from Clearfield County, at that time, at the second trial?

A. Certainly not.

Q. Is that true, whether or not a specific juror was challenged for cause or preemptorily or not at all?

A. It didn't matter. It was evident there was no way to get 12 jurors in that county in what I would say would be a fair and impartial jury.

Q. You heard Mr. King testify concerning the incident that occurred when the sheriff went out and got the panel he challenged.

A. Yes.

Q. Will you explain what, in your recollection, occurred?

A. The second panel that was brought into the courtroom was done at the orders of the Court, of course, and the sheriff and several of his deputies went out and personally selected those prospective jurors. In fact, one [125] deputy testified to the fact—certainly, Sheriff Sharney did not select them all, but one deputy testified to the fact that he had gone to pick up one juror and called that juror, who they thought might be good jurors in that area, and then went to their houses and delivered these subpoenas, and that is how that panel came into existence. And, of course, it was challenged, and Judge Cherry dismissed it.

Q. Excuse me. I want a clarification of that, because you say "good jurors." What do you mean by "good jurors"? Good for you?

A. Certainly, I didn't think Sheriff Sharney was concerned for my welfare, and that is not what I thought they were looking for, but that was the deputy's words, they thought they would make good jurors. And I was not

going to trust this trial to their jurors, who I thought were very prejudiced employees of the County.

Q. Did you think those jurors were prejudiced against you or good for you?

A. I felt they were prejudiced against me, if not because of being chosen by the deputy, just because they lived in Clearfield County.

Q. What happened then, as far as the selection of the next panel is concerned?

A. As I recall, the decision then was to use the jury wheel, and I think Mr. King was right in saying that [126] the Judge told the sheriff to go out and pick these people up and bring them in. That was pretty much the instruction of the Court, but, during the interim, the County Commissioner was—called in not all of them at one time, but the number that was believed to be adequate, which started out with 25 or 30 names, called the first page, and then, as we added more people to the actual jury, then the number of names drawn were reduced.

Q. How many panels do you recall were called in?

A. I recall that, definitely, five panels, in addition to the one that was challenged, and, as I recall, there was a sixth one called, and that is the one in which we finally filled out the jury, on the sixth panel.

Q. Did an incident occur, some time during the voir dire questioning of potential jurors when the Judge intervened, in connection with a motion for change of venue?

A. To me, there were a couple of outstanding things about that voir dire that really sticks in my memory, and that was one of them, for a lot of reasons. It was at the end of the fourth panel of jurors, and we had already completed the selection, I believe, of the regular panel, and we

were looking for alternates. We began at approximately nine o'clock in the morning, a little after nine o'clock, with nine or ten jurors—I believe there was a panel of ten called—and the Judge gave his usual preliminary [127] instructions to the jury panel, these prospective jurors and that lasted—it probably lasted maybe ten, fifteen minutes at the most. We went into the examination of these jurors, and this was well into the voir dire, and I think that November 10 or 11, something like that, and maybe even later, but, at any rate, we got through that panel of jurors before ten o'clock, and it was—I can recall that, because we were—what we were going to do, we started at nine o'clock, and before ten we exhausted this panel and, if we were to continue, we would have to get the jury wheel and go through another day's delay.

Q. Excuse me. If I can complete your testimony in this regard, is it your recollection that all ten of those jurors were challenged for cause?

A. All ten were challenged for cause. As I recall, juror after juror got on the stand and said they had a definite fixed opinion, and whether they were being examined by the District Attorney—most that were examined by the District Attorney were not examined by Mr. King, because they already made a statement that disqualified them, so they were immediately disqualified and challenged for cause, and the challenge for cause was granted by the Judge. And, when the last one was challenged, the reaction of the Judge was, "Challenge for cause is granted" and he promptly [128] stood up, banged his gavel on the bench, and said, "We just can't go on like this. We have to be concerned about the Defendant's rights," and he never said court was recessed or anything else, he turned and went out the back door, and the whole courtroom was in shock. When it happened, it was very

quiet, and I remember Mr. King saying to me it looked like something was going to happen. It was obvious something was going to happen, because the Judge was very distressed, and, we waited maybe five, ten minutes, and the Judge came back and said that the court was now in session, and I don't recall him ever recessing it. And he got into a discussion with the District Attorney, saying that something had to be done about this case, it was obvious that we couldn't get a jury.

Q. Now, before you go any further, was that discussion made a part of the record?

A. No, sir, because, when he came back—when he came back on the bench and said, "We are ready to start," and he had been—he started the discussion with the District Attorney and my counsel, regarding the difficulty in getting this jury, and I don't recall his exact words any more, but that was the discussion, and he looked down, and he said, "Are you transcribing this," to the reporter, and she said she was, and he says, "Well, you don't have to do that. This is not part of the record. This does not [129] have to be transcribed." And she quit, and she sat back, and the Judge continued and ordered the counsel for the Commonwealth and my counsel to prepare briefs, that there would be a hearing held that afternoon in the courtroom at 1:30 for a change of venue. And, up to that point, Mr. King hadn't said anything, that was done solely on the Judge's initiative, and he went on to discuss this whole thing. Of course. Mr. Reilly was rather perturbed by the whole thing, and they got into a discussion with the Judge regarding this proposed hearing and the fact that the Judge seemed rather set on doing something about a change of venue. And the Judge was rather hard on the District Attorney, at that point, trying to explain to him that he felt we had gone beyond the point

where we could assure the Defendant a fair trial, as he described it.

Q. Approximately how long did that conversation or hearing take place, that you are now referring to?

A. Somewhere between a half hour and an hour. It was in that general area.

Q. Is any of that hearing reflected in the transcript?

A. No, sir. It appears nowhere in there.

Q. Is there anything in the transcript to indicate anything took place, a recess or something like that?

A. Well, as I was searching for it in the record—[130] and it took me a while, because I remember it very vividly happening, and I looked for it in there. I could not locate it for a while, but then, by remembering that they had nine or ten jurors, I finally placed it down to where we had started in the transcript—it said we had started, for example, at nine o'clock. The court reporter stated on this date court was in session at nine o'clock, all right, and allowing ten or fifteen minutes for the Judge's instructions to each panel of prospective jurors, and the nine jurors were maybe only two or three pages each of voir dire examination, which is very short—in fact, they weren't even examined by both counsel, most of the time. So I would suppose most of them took less than five minutes to examine, but, at any rate, I recall it was before ten o'clock, and I think the record then—if you would look it up in the voir dire, that time is reasonably accurate. At any rate, it shows the jury being recalled after eleven o'clock, and I think it was after 11:30, the jury was recalled, and instructed by the Judge that we were going to take a recess, and that—and, as usual, instructed the jury they weren't supposed to talk to anyone, and so on. But that does show it is upon the record that, after 11:30, he did call the jury back, and there was some-

thing that went on in the courtroom between 10:00 o'clock and 11:30.

Q. Is this the time you were most optimistic [131] that a change of venue would be granted?

A. Yes, I was very optimistic then, and, of course, I was ordered taken back to the county prison for lunch, and two of the State Police officers who returned me to the county prison, Trooper Gorman and Trooper George, were discussing with me where I thought this trial was going to be sent to, and, of course, Trooper Gorman, who is from Fayette County, was concerned about it coming to Fayette County, and he wanted to go to Fayette County, and Trooper George thought it would go to Mercer County, because Judge Cherry had a friend up there that was a county judge, and they were certain that is where it was going to go.

Q. Meanwhile, what happened?

A. We had a delay, because one of the jurors' sisters died, and she had to be dismissed.

Q. Was that Juror No. 3?

A. That was Juror No. 3; yes. So the Judge excused her, and there was some discussion, then, regarding how they were going to handle the seating of that juror, because we had already seated the panel of jurors, the regular panel. So then we had the hearing, and that lasted until rather late in the afternoon, because it didn't start until about 2:30, maybe 3:00 o'clock, and it was scheduled to start at 1:30. It started rather late, and then, the next morning, the—or the Judge told us, at the hearing—[132] or no—the Judge told us, that morning, after the hearing, he would—he set the motion for 10:00 o'clock. He came on the bench and said the motion was denied and called for the jury immediately. There was no explanation given in open court.

Q. Was it unusual for an argument or hearing to take place and not be included as a part of the transcript?

A. Well, as I was examining the voir dire, I noticed that there were five or six places in there, at least, that discussions were held at side bar, that were not recorded, and, of course, there is reference made to meetings in libraries and in the Judge's chambers, and so on, that don't appear of record, either.

MR. SCHUMACHER: May I have a moment, Your Honor?

THE COURT: Why don't we just take three or four minutes, and I will find out the status of what is happening with our other case.

(A brief recess was taken at 3:00 p.m. o'clock.)

MR. SCHUMACHER: May I proceed, Your Honor?

THE COURT: Would you, please?

BY MR. SCHUMACHER:

Q. I was referring to other pages in the transcript where hearings or arguments were held, and no [133] record was made. Did you make an examination of the transcript, to present such examples to the Court?

A. I did. I noted several places throughout the voir dire transcript where reference had been made to side bar discussions and arguments, legal arguments and so on, had not been made part of the record.

Q. Would you state the pages of those transcripts where such hearings or arguments occurred?

A. Yes. Page 86, the Court noted that, "We will recess for legal discussion and resolve this once and for all," and that is not made a part of the record.

On page 706, the District Attorney asked to approach the bench, and all counsel approached the bench, and, obviously, there was a discussion, but it was not made part of the record there.

Page 724, Mr. King asked to approach the bench, and, again, there is a note, all counsel approached the bench, but there was no record made of that.

Again, Mr. Sabino, at page 962, all counsel approached the bench, and the witness was asked to step down from the stand, but there was no record made of that.

And, at page 1117, Mr. Fine, the Assistant District Attorney, asked to approach the bench, and note is made that all counsel approached the bench, and there was no record made of that.

[134] Q. Did any occurrence take place during the voir dire questioning, where it appeared to either you or Mr. King that the Judge would grant the change of venue motion?

MR. BELL: Objection, Your Honor, to the question as stated. He can testify that it appeared to him; I don't know that he can testify it appeared to Mr. King.

THE COURT: Do you want to rephrase it?

MR. SCHUMACHER: I will restrict it to the objected to question.

THE WITNESS: Certainly, the instance to which I previously testified, when the Judge left the courtroom; but, prior to that, I was informed by my counsel, Mr. King, that—

MR. BELL: Objection; hearsay.

MR. SCHUMACHER: I feel this is within the scope of Mr. King's representation of Mr. Yount, and it isn't offered for the proof of the facts asserted therein.

THE COURT: Okay. Go ahead.

THE WITNESS: I was advised by my counsel, Mr. King, that Judge Cherry had informed him that he would change the venue, as Mr. King testified to here earlier today, and that he then used a lot of preemptory challenges, not unjustifiably, I didn't feel, but at least he used them with less discretion than he had previously, to that point.

[135] BY MR. SCHUMACHER:

Q. What was your understanding had to take place in order for that request for a change of venue to be granted?

A. Well, I felt that—I believe that we had to exhaust the panel without getting a full jury.

Q. In other words, if you didn't seat a full jury by the time a given panel was exhausted, the motion for change of venue would be granted?

A. That is the message that had been relayed to me by my counsel.

Q. Was there any discussion concerning the number of preemptory challenges that you would receive in the case?

A. Originally, it was set at twenty, by statute, and I don't recall whether that was discussed in the courtroom, but I do recall it was mentioned by someone, whether my counsel or an actual courtroom discussion, but, throughout the voir dire, the number of preemptory challenges kept changing. At one point, as I recall, there was several

times there were jurors that we had to challenge preemptory, and then Mr. King would ask the Judge to reconsider the Court's decision not to grant a challenge for cause, and, if I recall, at one case, the Court did later, after we had used a preemptory challenge, and reinstated the [136] preemptory challenge, saying, in the interest of justice, that he would now change his ruling regarding that one particular witness or that one particular prospective juror, and then, when the juror was excused because the sister had died, there was some discussion regarding how many preemptory challenges would be allowed to replace this juror, because we had already selected a panel of jurors, and, of course, defense counsel argued for two jurors, and the Judge finally established that there would be one preemptory challenge given now, to fill that vacancy on the regular panel, and we went under that assumption, until we used that preemptory challenge almost immediately, and then the Judge changed his mind, well, he would grant two, but we had already used the one, as we had originally requested. So, throughout the voir dire, these kinds of discussions were held regarding how many preemptory challenges we were going to be allowed. At one time, there was a discussion regarding how the challenges for alternates would be, because we had used our twenty, because we had challenged a juror for cause, and we recognized we were out of challenges, and the Judge says, "You still have your two for alternates, so you can use that." Again, I can't say, but I recall that the Judge had said he had been given a case by the Commonwealth, and he read from it and said that that had been a ruling in error, that we were not allowed these preemptory [137] challenges set aside for alternate jurors against the regular panel. So that discussion also came up.

Q. Finally the twelve jurors and the two alternates were selected; is that correct?

A. Yes.

Q. Now, at that time, did you feel that you had a panel of twelve jurors and two alternates that could fairly try your case?

A. No, sir.

Q. Why?

A. I could only recall one juror who had not expressed an opinion regarding my guilt, and that was Juror No. 4, and, like I say, that juror testified that he had been in New York when this incident occurred, so—and all the other ones had given reason to believe they had opinions, that they may have not been telling the truth in its entirety, and they wanted to be on the jury, and that would not have been too difficult to do, but almost all of them said, at one time or another, they had an opinion, and I couldn't imagine how anyone could erase an opinion from their mind, in spite of the fact they said they would try. I have no doubt they were probably expressing what they thought they could do, unless they were deliberately lying to get on the jury, and that, I wouldn't know, but I thought they were trying to say what they would try to do, but, after listening to [138] their testimony and listening to them speak, in person, that they could do that—

Q. I previously discussed with you the number of spectators in the courtroom and community interest during the course of the second trial, so I won't repeat that questioning. Now, following your conviction the second time, did community interest then subside?

A. Again, I was at the State Correctional Institution at Rockview. Following that, I wasn't sentenced immediately, I was returned to Rockview as an unsentenced

prisoner and remained there until such time as the trial Court denied post-trial motions. And, during that time, I did receive some newspaper articles from my family and noticed some in the papers received from inmates in the Dubois—Clearfield area, but, over the time, it did subside somewhat, in terms of newspaper coverage, and I was not in the area to review television or radio coverage, so I would not be able to testify to that.

Q. From the—strike that, please.

A. Incidentally, I may add to that that, at Rockview, which abuts Clearfield County—it is in Centre County—there were many people at Rockview that were in Clearfield, especially, and they related to my case, to my—or attempted and represented to me the feelings in their area, the correction people.

[139] Q. Mr. King continued with post-trial motions, I believe you indicated, and, subsequently, an appeal again to the Supreme Court of Pennsylvania; is that correct?

A. Yes.

Q. Were those incidents reported by the news media, as far as you knew?

A. Yes.

Q. On numerous occasions, you have gone before the Parole Board for a consideration of release on parole; is that correct?

A. Board of Pardons, yes.

Q. Board of Pardons. As far as you know, have those matters had community interest in Clearfield County?

A. Yes. When I first applied for clemency or commutation to the Governor, which is the way it is done in

Pennsylvania, the application received almost headline response in the newspapers. More recently—and I have applied eight times—more recently, they have received a lot less space in the newspaper, but, inevitably, they appear on the front page, and—at least, that is what I see in many papers I happen to receive from Clearfield County or that are sent to me.

Q. You have heard some testimony here concerning petitions opposing your release. Do you have any personal knowledge or information concerning those, that you want to [140] call to the attention of the Court?

A. I have no personal knowledge, because I do not attend hearings. You must have an advocate there. I have no personal knowledge, other than what he told me. They were delivered by the District Attorney or the Assistant District Attorney or those opposing it.

Q. As I previously indicated, the major issues—in fact, all of the issues that are present at this hearing and on which testimony is being presented today were raised by you; correct?

A. Yes.

Q. And the factual basis for those issues was also raised by you in the pro se motion that you filed?

A. Yes.

Q. Now, I have attempted, as your Court-appointed attorney, to present any and all evidence that I thought would support that, but, if you have any additional testimony that you want to give to Magistrate Mitchell, I ask you now to do so.

A. Well, from the very outset of the voir dire, I was convinced that Judge Cherry was really set on the trial staying in Clearfield County, and I think that he tried to

do a lot of things to overcome the prejudice that I am sure he was aware existed in that county. For example, he added these preemptory challenges, from time to time, and [141] he stated it would be done in the interest of justice. One time, during the trial, I recall the Commonwealth complained—the District Attorney really complained about the manner in which Mr. King was questioning jurors, saying he was leading them, and he was getting into areas that weren't permissible, and that was the cause for these people having to be excused for cause, because he was making them say things they really didn't believe. So, of course, Judge Cherry said, "Okay, I will initiate the questioning, I will explain certain things to them," and he did that, and I am sure he was doing that to—maybe believing that it was my counsel and leading questioning was doing it. He did that for, maybe, eight, ten twelve jurors and quit, because it didn't matter. He had tried to eliminate what the Commonwealth is complaining about and, still, these jurors had fixed opinions, and they said, "No way, I made up my mind and I won't change it, I cannot change it." And I think he realized, therefore, that his attempts to overcome this prejudice in that regard was useless, and he just quit doing it, and, as I say, throughout the trial, he would say, "I am going to give you another preemptory challenge, I am going to give you another one," and he made up his mind that trial was going to stay in the county, whatever reasons he had, and he was trying to overcome the prejudice, but he could not do it. It was evident whatever [142] he tried was not going to work. I think one of the most telling examples—and it came up today, about the one witness having a father-in-law that was a prospective juror, and I didn't realize that

until about a week ago, when I was reading the transcript, and her testimony surprised me, saying that her father-in-law was so opposed to me and before he even went to Clearfield, because, reading his testimony in voir dire, he said he had no opinion. He stated his wife had one, and he even admitted his daughter went to school where I taught, and he said he didn't have an opinion, and we could not believe him. We couldn't believe anyone who went to that school and had a daughter in the same class as Pamela Reimer and whose wife had an opinion could sit up there and say that, and it was impossible to believe these people could sit up there and say that.

So the preemptory challenges Mr. King was using were not wasted. I think he used some discretion at some time because of the agreement he felt we had with Judge Cherry, but I think this Mrs. Ives, if there is any truth in what this witness said, that her father-in-law had a fixed notion when he went over there, I think this is generally indicative of the people's feeling. You could not believe these people getting up there, saying they could abide by the law and give me a fair trial, because, every time they got up there, Judge Cherry said, "It is your duty as a juror to [143] put these things out of your mind," and it is difficult for the people to say, "I can't do that, I can't be a good citizen." Maybe some of them did not believe they were prejudiced. Maybe they were sincere in that, and they didn't feel they were prejudiced, and they could dismiss it; but we didn't believe them, and I didn't believe them, and, as a result, I didn't feel there was a way we could get a fair trial there.

Q. Therefore, you felt that you were denied a trial by a fair, impartial trier of fact in Clearfield County?

A. Very definitely so. I cannot believe that a jury could sit there and listen to the evidence that was presented and recall all these things that have been discussed and written and appeared on television, and come to a fair conclusion about this case, especially absent the charge of rape.

MR. SCHUMACHER: No further questions.

THE COURT: Mr. Bell.

Cross-Examination

BY MR. BELL:

Q. Mr. Yount, that opinion you just stated for us—you didn't feel you could get a fair and impartial trial—is that based upon your reading of the transcript of the voir dire, your opinion of actually being there and [144] actually watching the process take place?

A. Yes, both of those; and, of course, just the feeling I had when I would be returned to Clearfield County, for example, and put in the county prison, the obvious concern for my safety and so on, it didn't seem to be apparent for any of the other prisoners there. And, while I was there, there was another prisoner brought in that was in there for homicide, as well, and they didn't seem to be as concerned about him as they were in my case, and that whole feeling came through to me, and they said it was about publicity that came out because of a newspaper article or something. And I really feel you sit there and listen to so many hundred people sit there and said, "I think you are guilty," and there is nothing to change their mind, until you really get an opinion, yourself, that they are expressing the attitude of the county.

Q. Did someone actually indicate to you—you indicated, when you were brought back, they put you in solitary. Did they ever actually indicate to you what the purpose of that was? Did someone say, "This is for your own protection"?

A. Yes. When I was brought back to the first change of venue hearing in June of 1970, they told me I would be put in the juvenile quarters. There were no juveniles in the prison, and I would be isolated from the [145] general population because they feared for my life, and they had had threats on my life. Again, I couldn't verify that. And, when I was initially put in the county prison, periodically I would be put out in the population, and mostly at the urging of the other prisoners, "All right, let him out," that type of thing, and, eventually, they would agree to that, and, eventually, they would come in and say, "We have to lock you up. There was an article in the paper today, and we are just afraid of what might happen."

MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher, anything further?

Redirect Examination

BY MR. SCHUMACHER:

Q. This one thing the Commonwealth raised, in answer to your petition, that I would like you to respond to, and that is the delay that took place in your filing. I think you should explain that to the Court, as well, since the period of time has passed since you exhausted your state remedies before you filed your petition. Would you please explain that to the Court?

A. As I recall, my appeals within the state were exhausted in 1974, when the Supreme Court affirmed the decision of the lower court, and, of course, I had no personal contact with Mr. King at that time, because I was, at that time, at Camp Hill, had been transferred to Camp Hill, and [146] he was in Pittsburgh. So I wrote to him and asked him if we were going to continue this further and so on. He advised me—and I believe that I sent you a letter or I gave this letter to you—but he advised me that he didn't feel that we could have success continuing our appeal in the Federal Court, because we would have to appeal directly—our only appeal was directly to the Supreme Court, and he didn't feel that they would grant certiorari. And, of course, at that time, I had no knowledge of habeas corpus or any Federal petitions, really, and I just accepted his judgment on that, it would be similar to the certiorari the Commonwealth had made at the time my conviction was reversed. And he also said his responsibility to me as counsel had ended with that, and we would have to make some other kind of arrangements, financial arrangements, and so on, and I didn't feel I had any finances, at that time, to continue, so I just didn't pursue it.

Q. In other words, you didn't know about this avenue of relief until recently?

A. I didn't—I think almost anybody who has ever been in prison has heard about a habeas corpus petition, but everyone's idea of what it is is altogether different, and my experience had been very limited, in terms of any legal expertise, and, at any rate, it wasn't until later that I got involved with the Federal—different types of Federal [147] petitions, and I realized that I had this avenue open to me, and that is when I filed the petition.

MR. SCHUMACHER: No further questions.

THE COURT: Mr. Yount, I want to ask you, is there anything else you want to add? I know Mr. Schumacher asked you that once, and I just want to ask you again, to make sure that you realize this is the time to raise any possible issues that you wish to raise.

THE WITNESS: I think the issues have been raised in the petition. I did raise issues that have not been brought up here today, in terms of the Judge's charge to the jury, and there was some question about whether or not they had been exhausted in terms of the state remedy, and I am certainly not an expert on that, as to whether they had or not. I felt that, because the State Supreme Court had, at some point, responded to them and said they could no longer consider them and whatever, that I had absolved my responsibilities in that regard. But, at any rate, I still believe that those issues—whether or not they could be considered by this Court individually—gives a very good picture of the instructions and the trial, as such, and I felt that those errors, even though they may not be considered individually, paint the picture of a very unfair and prejudiced jury already predestined to convict me, but I don't think that charge to the jury by the Judge helped [148] at all. In fact, it was very hostile.

THE COURT: Is there anything else?

THE WITNESS: I can think of nothing further.

THE COURT: Mr. Bell, anything for the Commonwealth?

MR. BELL: Nothing further from the Commonwealth.

THE COURT: Mr. Schumacher, anything further?

MR. SCHUMACHER: No, sir.

THE COURT: Mr. Bell, will there be any testimony from the defense?

MR. BELL: Your Honor, at this time, there will be no testimony on behalf of the Respondent. I would ask that the record remain open, such as we have had testimony here today of several occurrences the Petitioner has indicated were not on the record. I have not had occasion to speak to Judge Cherry or Mr. Reilly, who was then District Attorney, as to that. Perhaps that can be handled through an affidavit. Perhaps, after I discuss it with them, I can call Mr. Schumacher and make arrangements for some affidavits or whatever.

THE COURT: All right. Unless you feel there is some need to have testimony presented, we will consider the testimony closed.

Do you wish to argue the matter now, or would [149] you prefer to do that in briefs?

MR. SCHUMACHER: I would prefer to file a brief, Your Honor. I have to digest all the complex material that was just testified to today.

MR. BELL: Your Honor, I would be happy to do it by brief. I have filed a brief today with regard to some of the issues, the exhausted requirements, etc. I would present a copy of that. I would reserve the right to respond to the Public Defender's brief.

THE COURT: Mr. Schumacher, about how long would you need for your brief?

MR. SCHUMACHER: Because of pending case commitments, Your Honor, I would feel that it would be difficult for me to file my brief prior to the end of the year.

THE COURT: Mr. Yount, do you have any objection?

THE WITNESS: Are you saying it would be—

MR. SCHUMACHER: By January 1.

THE WITNESS: I have no objection.

THE COURT: All right. So we will have the Plaintiff's by January 1. Mr. Bell, how long do you need to respond to it?

MR. BELL: If I could have a month, Your Honor, by February 1.

[150] THE COURT: Okay. Now, Mr. Schumacher, if you wish to file any further response to the Defendant's brief, I say, do so promptly. I hope to start working on it now, and then I will use your brief as a guidance, because I fear, if I wait until the briefs are filed, it will take me two or three months to go through the record, and I would rather have an outline in mind at my leisure, rather than race through the thing at the last minute. I would sooner dispose of it, because, by the time the Respondent's brief is filed, the case will be a year old.

MR. SCHUMACHER: The one case that Mr. Thieman and I have been talking about recently—if that doesn't go to trial, I will have this prepared immediately. I have filed an answer to your comment, and I will file it now, and I will give the Court one.

THE COURT: Mr. Schumacher, we will expect your brief by January 1. If you can get it in sooner, fine. And we will expect the Commonwealth to respond within 30 days of Mr. Schumacher's brief, no later than February 1. However, if Mr. Schumacher's brief comes in at a time that you are tied up in trial, let me know. If you need more than 30 days, we will grant that, but February 1 will be the outside limitation.

MR. BELL: Very well.

THE COURT: Is there anything else that should [151] be taken care of here, at this time?

MR. SCHUMACHER: No, sir.

THE COURT: Anything for the Commonwealth?

MR. BELL: Nothing, Your Honor.

THE COURT: On just one other matter, Mr. Schumacher, you will attempt to get the Supreme Court briefs on at least the second appeal and, if possible, the first appeal?

MR. SCHUMACHER: Yes, Your Honor.

THE COURT: All right, then. We will recess.

(The entitled matter was adjourned.)

Reporter's Certificate

I, Theodore W. Thomas, do hereby certify the foregoing to be a true and correct transcript of proceedings held in the entitled matter at the time and place noted in the heading hereof.

(s) Theodore W. Thomas
Theodore W. Thomas
Official Reporter

EXHIBIT P-1-a

THE COURIER-EXPRESS

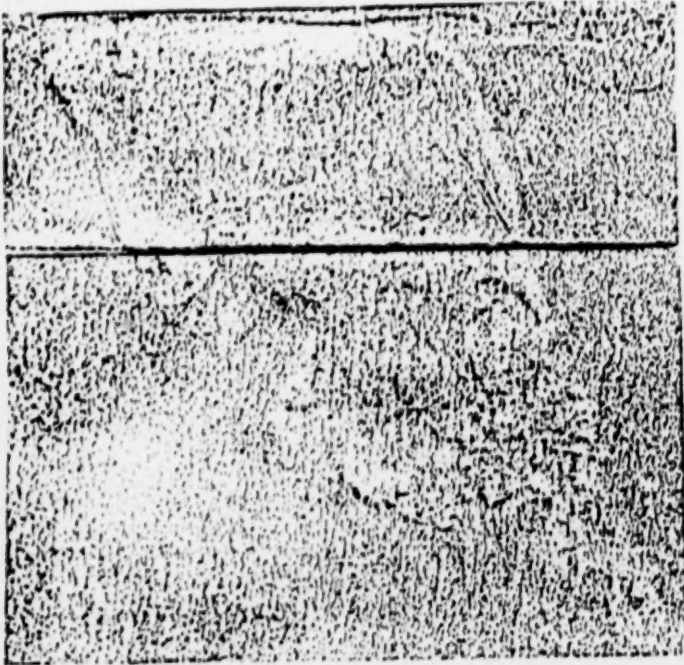
Vol. 87-No. 101 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Friday, April 29, 1966
Dial 371-4200 Pages

**MATH TEACHER HELD FOR BRUTAL SLAYING
OF LUTHERSBURG GIRL**



LEAVING ARRAIGNMENT at 10:15 this morning from the Alderman Merritt I. Edner's office is the

suspect in the Luthersburg murder case, Jon E. Yount (center). He is flanked at left by Detective Kenneth Bundy of DuBois, and Detective Ed Kerr, of Punxsutawney, at right (C-E photos by Joe Shields).



BODY IN THE WOODS. The body of Pamela Sue Rimer is shown in the woodlands, where it was found late yesterday afternoon.

JON YOUNT, 28, GIVES SELF TO POLICE

By George Waylonis, Managing Editor

DuBois state police this morning charged a young married teacher of mathematics at DuBois Area Senior high school with the savage slaying of an 18-year old honor student yesterday.

Jon E. Yount, 28, of DuBois RD (Gelnet Section) was arraigned before Alderman Merritt I. Edner at 10 a.m.—Five minutes later he was remanded to the Clearfield County jail pending a formal hearing here Monday at 4 p.m.

Yount turned himself in at the state police substation here this morning at 5:45 after a score of troopers scoured woodlands all night for clues; & a three-state alarm was out for a green or blue station wagon with a chrome luggage rack on top. Police declined to say what Yount told them.

State police said the girl had been stabbed many times in the head and neck, and a stocking was wrapped around her neck.

An information of "murder and rape" was filed against Yount at the preliminary arraignment, by Trooper Donald Medford. Yount said nothing at his arraignment. The suspect, a native of Sandy twp., was termed by many of his students as a brilliant mathematics teacher.

In the second hideous slaying in this area in five years, the body of Pamela Sue Rimer, 18-year-old daughter of Mr. and Mrs. Douglas B. Rimer, of Luthersburg RD, was discovered crumpled in a sparse thicket a short distance from her humble homestead in Brady twp.

Less than an hour before she had alighted from a school bus and began her mile trek up a desolate dirt road to her home. She never made it.

Instead, police theorized, she entered or was forcibly dragged into the automobile which was sought,

and an attempt made to criminally assault her. Farm reared, and a strong girl, indications were she fought fiercely.

Mute testimony to her struggle was the trail ... the lonely road, which prompted her father to telephone state police in DuBois that his daughter was missing, and that he feared foul play.

Friends in DuBois, (Oklahoma), too, had been telephoned earlier. Their concern rushed them to the scene and they discovered the body minutes before the victim's parents and a trooper from DuBois, Raymond Fratangelo, came upon the scene.

It is a lonely and desolate country road. Traffic is extremely light. And, because of this, neighbors said they had noticed a blue, or green, or blueish-green station-wagon, with a chrome baggage rack on top, drive into the lane at an average speed, but departed a short time later at an excessive rate of speed.

This is the reason police were seeking the driver of this automobile—a Ford Falcon or a Nash-Rambler.

This is the only clue police said they had.

For Pamela Sue Rimer was a home-girl, who studied assiduously (she carried an extra heavy school schedule), who loved to tend her black & white horse Stormy; who had no steady boyfriends and who was wrapped up in 4-H Club projects and chemistry, a favorite subject in school.

An hour after the discovery, her mother, who is employed by the Cameron Manufacturing Co., in Reynoldsville, was under a physician's care. "Why did it happen," she cried to those around her.

For Pamela Sue was the last of her two children. Her other also died a violent death. Her son Douglas, was killed April 1, three years ago when he was pinned against a barn by a tractor in a farm accident. He was only 10, Pamela Sue was known as "Bunny" to her many friends at DuBois Area Senior High School. She was a senior and was looking ahead to college this Fall.

A pretty brunette, she filled her school days with study, and band music, and her farm activities.

Her home was in the pastoral rolling countryside of the Luthersburg-Troutville area, away from main highways. But she met her violent death as she walked the mile from the school bus stop. Her body was discovered a short distance from the dirt roadway. She, apparently, was carried to the spot by her assailant. Her humble, weather-beaten homestead was not too far away.

The discovery of the body was made shortly after 5 p.m.

When her daughter did not return home from school at her usual hour, Mrs. Rimer telephoned Earl R. Zartman residence in DuBois RD 3 (Oklahoma) to inquire if her daughter had band practice at the high school; or if she was visiting the Zartmans. Mr. Zartman is employed at Jeffers Electronics plant. The Zartmans and Rimers have been close friends for many years.

Concerned about the disappearance, Mr. Zartman and his wife, Elvira, and their 18-year-old daughter, Lona, long-time schoolmate of the victim started driving to the Rimer home.

A short time later, the father, who was searching the area, came across his daughter's school-books, and saw bloodstains. State police were summoned and a patrol car was dispatched to the scene.

The Zartmans were driving up the dirt-road to the Rimer home when Mrs. Zartman noticed "something blue" on top of the hill. She and her daughter investigated and found the body.

A state trooper, having arrived in the area, was only a short distance away and he was immediately summoned to the body.

His quick call to the sub-station in DuBois immediately set state police units into action. Detectives and troopers from Punxsutawney and DuBois went to the scene immediately. The area was blocked off so that it could be combed for clues.

A slight drizzle and overcast skies, brought darkness earlier than usual. Rains during the past two days made the dirt road soggy. Police were able to trace an auto which had turned around in the general area of the scene. Numerous plaster of paris casts were made of tire prints.

When the body was found, her coat was torn on the back, her blouse blood-stained from the wound in her throat, and a stocking knotted around her throat. One of her sneakers was off her foot, lying nearby.

An intelligent girl, Pamela was taking the academic courses at the high school, taking ... courses in several subjects, and taking more subjects than required. She had already been accepted as a freshman at Pennsylvania State University this Fall.

526a

Exhibit P-1-a

An excellent musician, she had first chair in the clarinet section of the school band.

And she also liked farm-life

See SLAYING, Page 2



LONA ZARTMAN

...Of DuBois RD (Oklahoma), a school-chum and personal friend. She was there when the body was found.

THE VICTIM....



Pamela Sue Rimer

528a

Exhibit P-1-a

THE SUSPECT....



Jon E. Yount

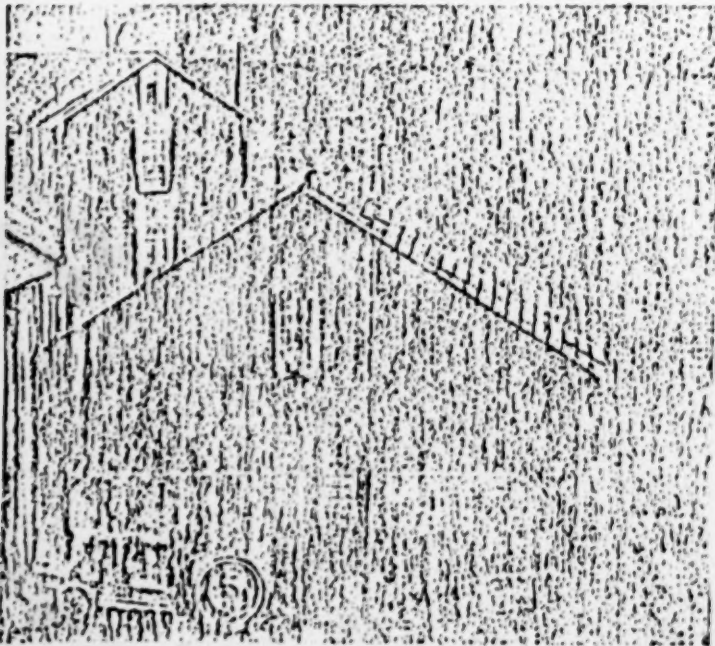
EXHIBIT P-1-b

THE COURIER-EXPRESS

Vol. 87-No. 102 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Saturday, April 30,
1966 Dial 371-4200

Rimers Were Building a New Home:

RIMER MURDER WEAPONS IN POLICE POSSES-
SION





BASE OF THE TREES shown above is where the body of Pamela Sue Rimer was found [yester]day evening. The school bus in the background shows the short distance from the road- Other photos page 2).

WAS THIS THE LAST VIEW Pamela Sue Rimer had of her home. This photo was taken from point where police believe she was accosted. The photo shows the barn and the farmhouse at left. The photo was taken from a point on a slight rise in the road near the point the body was discovered. (C-E photos by Shields).

The Douglas Rimers of Luthersburg RD had been busy in recent months constructing a new residence.

He was a general mechanic for the Elmer Halstrom Construction Co., in DuBois, so he knew how to do most of the work himself.

The frame of the new home was up.

Included in this new home was a large bedroom. It was for their daughter, Pamela Sue, age 18.

The furnishes for this big bedroom were already selected. But, on Monday state police will present evidence at a public hearing, at which time they will ask that Jon E. Yount, a math teacher at DuBois high school be formally charged with the murder of Pamela Sue.

Her blood-stained body, pockmocked with numerous stab wounds about the face and neck, was found early Thursday evening a short-distance from her home.

At 5:50 a.m. Friday, Jon Yount, termed as a brilliant mathematics teacher by many of his students, walked into the DuBois state police sub-station and calmly said: "I think I'm the man you're looking for."

Sergeant Harry Ellenberger, in charge of the local sub-station, said today that two weapons, believed to

have been used in the murder, are now in their possession. They are a small knife and a wrench.

The blood-stained clothing of the victim and clothing from Yount are also in police possession.

Only a few details of the autopsy have been revealed by the authorities.

They said the 18-year-old honor student at DHS died of injuries by the many wounds of the neck and head and shock.

The girl was criminally assaulted, the authorities said.

It is believed that Yount will be committed to the Warren State Hospital for a 90-day period, during which time doctors there will conduct various mental tests. This has been a normal procedure in recent homicides in this county.

According to reports, Yount had been in the vicinity of the Rimer home many times, looking over possible land he was interested in purchasing.

Presently he owns a ranch-type home between Gelnet and Sabula. There is a large pond on the property, well-stocked with fish. He had lived there with

See RIMER, Page 2

RIMER

his wife, the former Ruth Kelgren, 25 formerly of Emerickville, and their two children Jon, 3 and Karen, age 1. It was reported that this home was up for sale because Yount was considering accepting a four-year scholarship at the University of Montana.

Yesterday, Yount was reported as saying "I don't know what happened." When he met his parents, Elveen and Caroline Yount; after his surrender, he apologized to his parents for the embarrassment and hardships he had caused his family.

Member of Class

Miss Rimer was a member of Mr. Yount's advanced math class, the only girl among a group of eight boys. It had previously been reported to the Courier-Express by school authorities that Miss Rimer was not in any of the classes taught by Mr. Yount. According to a source of school information Miss Rimer had discussed school problems with her math teacher as the regular session ended.

The DuBois Area High School was stunned Friday morning first by the brutal slaying of the popular young girl—a member of the school band and honor student—and then by the announcement that Mr. Yount, re-

EXHIBIT P-1-d

THE COURIER-EXPRESS

[Vol. 87]-No. 104 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Tuesday, May 3, 1966

Dial 371-4200

16 Pages

[P]OLICE READ YOUNT STATEMENT AT HEAR-
ING

THOSE LEFT BEHIND



PAM'S PARENTS, Mr. and Mrs. Douglas Rimer are shown above during the burial services for their daughter.

HUNDREDS ATTEND BURIAL; MILITARY RIGHT FOR GRALLA

Full military rites were accorded to the late Pvt. Paul M. Gralla here yesterday.

He was the son of Mrs. Adeline Gralla, of Lord St., who perished in the crash of an airliner near Ardmore, Okla., on April 22.

And ironically, his burial was on "Loyalty Day—Youth Day" in DuBois—when high school seniors learn at first-hand the operations of the democratic form of government.

And on the same day, as Pamela Sue Rimer was, too, to be buried.

For Pvt. Paul Gralla, too, had been a member of the Class of 1966 until he enlisted in the army last November.

He did so because he was following a tradition in the Gralla family. His three brothers all were in the military service.

Conducting the special military rights during the funeral service at the St. Catherine's church and cemetery was a unit of 13 military men.

Of this, a reserve unit from the University of Indiana of Pennsylvania conducted the rites. Captain Herrmann, of that school acted as the coordinator between the military and the bereaved family.



FUNERAL PROCESSION extends several blocks on S. Main St., and overflows on "off-streets" for the Rimer services yesterday.

By **GEORGE WAYLONIS**
Managing Editor

Eight cherub-faced young men carried a white coffin from the Woods Funeral Home yesterday afternoon.

This was an elite group—the remaining members of the Advanced Mathematics class at DuBois Area Senior high school.

They were the male students of that special class.

And they were carrying the body of Pamela Sue Rimer to her final resting place—in the Lakelawn Memorial Park, in Reynoldsville.

She, too, had been a member of that elite group—the only girl student in that special class. But her life was snuffed out violently late last Thursday afternoon as she walked alone down a desolate country road, alone, her school books under her arm,

her homestead was practically in sight when she was accosted. And she was criminally assaulted and bludgeoned to death by a heavy object and stabbed numerous times in the neck by a small knife.

— 0 —

HER DEATH CAME Thursday under lead-colored skies and in a slight drizzle. She was there alone with her attacker.

Her burial yesterday was under a bright sun and crisp air. And before several hundred persons.

As the funeral service was conducted for her on the other end of DuBois, across town on the East Side another member of that elite group was ...

This was Jon E. Yount, the teacher of this special Advanced Mathematics class.

Handcuffed, he sat taciturn in the packed hearing room of Alderman Merritt I. Edner, 501 N. Fourth St.

He looked calm but decidedly dejected as he listened to the minor judiciary read the two charges against him—rape and murder—as filed by Trooper Donald Medford, the official prosecutor for the State Police.

And when asked his plea he quietly said "Not Guilty."

It was then District Attorney John Reilly, called the first of three witnesses.

And after the three were heard, Alderman Edner declared that Jon E. Yount be held on charges of rape and murder until the next term of Clearfield County criminal court.

THE HEARING WAS over within 15 minutes, and the suspect was returned to the county jail, where he has been held since around noon last Friday, after his preliminary arraignment Friday morning.

Earlier that Friday, he had walked into the state police sub-station at West Liberty and calmly told officers "I think I'm the man you're looking for."

That was at 5:45 a.m. Within two hours, he had given the police a statement. This was read by Trooper Medford at the hearing yesterday.

This was the first public disclosure that Yount had given a statement to the police.

In the statement, as read into the record of the public hearing. Yount had related that he had left school at about 3:45 p.m., and had gone directly to the B. F. Goodrich plant where his wife is employed as a bailwinder.

IT WAS HIS INTENTION, he told police—to obtain money from his wife with which to purchase parts for their foreign compact auto. When his wife did not have sufficient cash, he decided instead to drive to the Luthersburg-Troutville area and examine some properties for sale.

Not finding any lands he was interested in, he drove out the road leading to the Rimer home.

He stated he then saw Pamela Sue Rimer walking the lane toward her home. He stated he recognized her and stopped and inquired if she knew of any land for sale in the area. According to Yount, Pam replied there "were a couple for sale around here."

Yount stated then he asked her if she needed a ride home and if she could show or de-

See HEARING Page 2

HEARING

scribe the land to him. According to Yount, Pam climbed into the front seat, beside him.

Continuing his statement Yount said he continued speaking about properties for sale. He described her as being friendly and so he said he asked her if she would like to go for a ride.

At this point, Yount, in the statement said: "She got upset and said she would not and that the proper people should be told about me. I had never done this sort of thing before with my students and I'll never know why I did this time."

At this time, the statement continued, the girl began to leave the car and he attempted to bring her back into the auto by lugging at the back of her coat, "but she fought."

HE THEN TOLD of picking up a wrench on the floor of the car and swinging it at her several times. He told of her running from the auto. He said he

chased after her, pulling her down and attempting to talk to her.

He said she would not listen.

In ending his statement, he told of remembering his running back to his auto, noticing the wrench on the ground, picking it up, along with his hat. He stated he threw the wrench out of the auto on his way home.

"I dazedly walked around not really believing what had happened," his statement read. He told of removing his clothing burning some of the items and hiding the remainder. He then drove to the home of his babysitter and picked up his two children and returned home.

"I DID NOT KNOW for sure that I wasn't dreaming all of this until my wife told me what she had heard on the news," his statement read. "I tried to sleep but could not so I went to the state police station at 5 a.m. and told them what had happened."

Yount was represented at the hearing by his attorneys, David Blakley, of DuBois, and David Ammerman, of Curwensville. They presented no witnesses in his behalf.

The other witnesses were Trooper Raymond Fratangelo, who told of being detailed to the area when a call came that Miss Rimer was missing and foul play was feared. He said the grandmother identified the victim as being Miss Rimer.

DETECTIVE KENNETH BUNDY was the other witness. He told of witnessing the autopsy performed at the Maple Avenue Hospital, and the pathologist stating that a liaison had been committed.

None of the testimony was objected to by the defense attorneys.

The hearing scene was moved up to 2:30 p.m. instead of 4 p.m. as originally announced. Only three newspaper and one radio station representatives were in the hearing room with state police personnel.

WITH DISTRICT ATTORNEY Reilly was his assistant, Irv Fennell, of DuBois.

Non-police persons were frisked before being permitted to enter the hearing room.

None of Yount's family was present during the hearing. His....

BUT ACROSS TOWN—on Main St.—traffic was jammed as approximately 100 autos lined the Street, and the off-streets joined the funeral procession to the Reynoldsville cemetery. The procession was joined with about another 50 autos at the cemetery, mostly students from DuBois Area senior high school. Observers said it was probably the largest procession in contemporary times.

It is expected that District Attorney Reilly today will petition the court to have Yount taken to the Warren State Hospital for 90-days of psychiatric testing. This has been customary in recent homicide cases in Clearfield county.

EXHIBIT P-1-f

NO. 1 MONDAY—SEPT. 19th

THE COURIER-EXPRESS

Vol. 07-No. 220 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Monday, September 19,
1966 Dial 371-4200 16 Pages

YOUNT TRIAL GOES ON

CLEARFIELD—A defense request that the start of the Jon E. Yount murder case be delayed at least two weeks in order to permit the completion of medical reports and the subsiding of publicity given the case has been denied by Clearfield County Judge John A. Cherry.

The trial in which the 28-year-old DuBois school teacher is charged with the slaying of 18-year-old Pamela Sue Rimer of Luthersburg R.D., will begin as scheduled at 9 a.m. Monday, Sept. 26.

The delay in the case was requested by Defense Attorney David E. Blakley at a required pre-trial conference last Wednesday. The conference in which rules for trial of the case were set up, was moved from open court to the judge's chambers at the request of the defendant and his attorney.

Mr. Blakley referred at that time to the wide publicity given in the Clearfield County press, but he mentioned particularly a story in a New York newspaper.

He labeled the story "defamatory and prejudicial to the right to a fair trial" and asked that the trial be

postponed at least two weeks to help this publicity to subside.

Mr. Blakley said he was not asking for a change of venue since the newspaper is widely circulated throughout Eastern United States and the defense felt a change of venue would accomplish nothing.

In answer to Mr. Blakley's request, District Attorney John K. Reilly said the New York paper was not widely read

See YOUNT, Page 2

YOUNT

throughout the county and he doubted if many persons were even aware of the story.

In arguing for the start of the case on Sept. 26, the district attorney noted that the defense has had since April 28 to prepare its case and complete medical reports to be presented at the trial.

He also said further problems would be caused by any delay since more than 200 persons have been told to report Sept. 26 for jury duty.

Judge Cherry, in refusing the request for the delay for the trial, said he felt publicity given the murder has not injured the defendant's case.

At the same time he announced general rules for the trial which will be in effect to assure the defendant a fair trial and to preserve the dignity of the court.

These rules will also affect the general public since they will limit the number of spectators permit-

ted in the courtroom and the public use of sections of the courthouse leading to the courts.

The number of spectators permitted in the courtroom will be limited to the seating capacity.

No one will be permitted to stand and no extra chairs or benches will be brought in.

The public will be permitted only in the courtroom and at recess will not be allowed to gather in the area at the rear of the courtroom where the law library and the judge's chambers are located.

The only persons who will be permitted to use the back stairs leading from the side entrance to the courthouse will be the defendant, the attorneys and witnesses in the case and attorneys having business with the court.

Admittance to the law library will be restricted to attorneys.

Deputy sheriffs will be posted throughout the courthouse to assure that the court rules are adhered to throughout the trial.

EXHIBIT P-1-g

No. II MONDAY—SEPT. 26

THE COURIER-EXPRESS

87-No. 226 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Monday, September 26,
1966 Dial 371-4200 10 Pages

[Y]OUNT DEFENSE BOLSTERED; PICKING
JURORS TO...

SELECTIONS BEING MADE FROM 252; CALL 100
EXTRAS

Opposing lawyers began the selection of jurors this morning. By noon today three jurors had been selected. The selection will continue this afternoon.

Selected this morning were: Ann P. Hillman, State St., Curwensville; Dorsey Neeper, laborer, RD Curwensville; and Mac Weaver, Businessman, 714 Maple Ave., DuBois.

Homer King, well known criminal attorney of Pittsburgh has joined the defense staff of David Blakley, of DuBois, and David S. Ammerman, of Clearfield. Mr. King appeared before Judge John Cherry Friday and was admitted to practice in Clearfield County court.

There are comparatively few DuBois persons selected for possible jury duty in the murder-rape trial of Jon E. Yount, DuBois RD 2, that gets underway today.

Selection of the jury was started this morning at 9.

Of the 252 persons on the list only 40 persons are from DuBois. Of this number, 26 are on the normal list called for criminal court. The other 14 are among the 100 additional names drawn for petit jury in case the original drawn list is exhausted before a jury is selected. It is recalled that lists were exhausted before the Aljoe trial.

According to the scheduling from the district attorney's office, the Yount trial will occupy this entire week. A total of 23 other cases have been scheduled beginning next Monday, Oct. 3.

Those selected for possible jury duty this week include:

Rebecca L. Ammerman, RD, Houtzdale; Doris J. Andrulonis, h.w., RD 1, DuBois; Madeline Askey, h.w., Grassflat; Grace I. Badger, h.w., RD 1, Falls Creek; Eugene Bagerstock, Accountant, DuBois; Frank J. Bagrosky, laborer, Osceola Mills; Catherine Bailey, Clerk YMCA, Clearfield; Ralph R. Baney, laborer, R.D. 2, Clearfield; Sam J. Barba, laborer, Clearfield; Twila G. Barone, h.w., Clearfield; Jean E. Barton, Teacher, Clearfield; Cora E. Beard, h.w., RD 1, Clearfield; Mrs. Jack Bergh, h.w., Smoke Run; Alta Blankley, h.w., Curwensville; Mrs. Lucille Bone, h.w., Mahaffey; Orma L. Bortot, laborer, Clearfield; Helen Boyce, h.w., R.D. Westover; James Bray, laborer, New Millport; Jean Brocail, h.w., Osceola Mills; Lucille A. Breece, h.w., Morrisdale; John H. Brown, Retired, R.D. 3, Clearfield.

William G. Brown, Jr., Salesman, DuBois; Mrs. Allen G. Butler, h.w., Lanse; Clara Shope Carr, h.w., Clearfield; Arlene Cathcart, h.w., Wallacetown; Charles E. Conklin, Retired, Grassflat; Foster Coulter, laborer, R.D., Morrisdale; Hazel Cowdrick, h.w., Clearfield; Sherman T. Cowdrick, II, Business Man, R.D. 3 Clearfield; John J. Daughenbaugh, laborer, Osceola Mills; Lenore Davidson, h.w., Curwensville; LeRoy Deasey, laborer, R.D. 2, DuBois; William J. Delaney, Clerk, DuBois; Paul V. Dixon, laborer,

Clearfield; Urey Dixon, Farmer, R.D., Woodland; Marjorie E. Dobson, h.w., Phillipsburg; Matthew V. Duke, Retired, Madera; Mrs. Luejeane Dunlap, h.w., R.D., Philipsburg.

Romaine Ellenberger, h.w., DuBois; David H. Evans, Retired, Clearfield; Mae Evans, h.w., Glen Richey; Alta R. Ferguson, h.w., Clearfield; Margaret Fetcenko, h.w., R.D., Philipsburg; Lois Fishel, h.w., Irvona; Floyd M. Frantz, laborer, Troutville; Catherine Frock, h.w., Westover; Paul A. Fulton, laborer, Cherry Tree.

Rose A. Getz, h.w., Clearfield; LaVaughn Glosser, h.w., R.D. West Decatur; Helen Gregg, h.w., Irvona; Isabelle E. Hartley, h.w., R.D., Morrisdale; Walter Hazelton, laborer, R.D., LaJose; Gearhart Hensel, Retired, Winburne; William R. Hoover, Ins. Agent, Clearfield; John F. Hughes, Jr., Sales Manager, DuBois; June Hughes, h.w., R.D. 1, Westover; Andrew Lytle Johnson, Retired, Clearfield; Zoe M. Jordon, h.w., Clearfield; Elmer N. Jury, Retired, Curwensville; M. C. Kanarr, Retired, Irvona; James R. Kaacuff, laborer, West Decatur.

Elmer Kellerman, Wire Chief, DuBois; Vanetta L. Kennedy, Factory Worker, R.D. 1, Osceola Mills; Ralph Kephart, laborer, Osceola Mills; Arthur A. Ketchen, laborer, Westover; Anna E. Knepp, h.w., R.D. Olanta; Merland Knepp, Retired, Wallaceton; George Korinchak, Retired, Coal-

See YOUNT CASE, Page 2

YOUNT CASE

port; Joseph Kosiba, Spring Fitter, DuBois; Mary L. Kost, h.w., Ramey; Mrs. Florence Kowalski, h.w., Clearfield.

Helen J. Krach, h.w., DuBois; Grace Lansberry, h.w., R.D., Woodland; Joseph P. Leyo, Merchant, Coalport; Edith Lindstrom, h.w., Clearfield; Mrs. Minnie H. Lippert, h.w., R.D. 2, Clearfield; Jeanne Llewellyn, h.w., Penfield; Mary Lorigan, h.w., Osceola Mills; Leroy S. Lowder, laborer, Wallaceton; Jean L. Lucas, h.w., R.D., Irvona; Paul Lucas, laborer, Smoke Run; Sheridan D. Luzier, Office Worker, R.D. 2, Clearfield.

Janet Lytle, h.w., Clearfield; Dana I. McGarvey, Farmer, R.D., Berwindale; Ella Mae McGarvey, h.w., Clearfield; Raymond McHenry, laborer, Houtzdale; Louis McMillan, Retired, R.D., Grampian; Ruth McQuillen, h.w., Wallaceton; Maxine Maines, h.w., R.D. 2, Clearfield; Anna Marando, h.w., DuBois; Shirlene Markle, h.w., Westover; Fred T. Mazimiec, Pipe Fitter, DuBois; Ernest Mitchell, laborer, Woodland; Rocco Madafer, carman, DuBois; Nicholas E. Mondock, laborer, Morrisdale.

Clara Moore, h.w., Clearfield; Janette M. Moore, Reg. Nurse, Clearfield; Gertrude J. Myers, h.w., Clearfield; Dorsey Neeper, laborer, R.D., Curwensville; Mary E. O'Dell, h.w., Manson; Rose Marie O'Neill, h.w., Osceola Mills.

Nick F. Paglia, Salesman, DuBois; John Pallo, Retired, Hat Run; Kenneth D. Pearce, laborer, Burnside; Guiseppe Pellen, Retired, Clearfield; Mrs. Margaret F. Pitrovich, h.w., Ramey; Mike Pollock,

Carpenter, Osceola Mills; Julia K. Potts, h.w., Clearfield; Joseph Prontock, Office Worker, DuBois; Mrs. Mary Records, h.w., Clearfield; Margaret Rasavage, h.w., DuBois; Burley Rowles, Merchant, Curwensville; Peter D. Saggese, Rest Worker, Hawk Run; Mrs. Faye Sahm, h.w., Burnside; Jo Ann Sankey, h.w., Clearfield; Robert L. Scott, Mail Carrier, DuBois; Henry Serafini, laborer, DuBois; Lavone Shaffer, laborer, R.D. Grampian; Robert W. Shaw, Construction, West Decatur.

Marlin Shope, laborer, Utahville; Joseph G. Shugarts, laborer, R.D. 2, Clearfield; Marion Sidorick, h.w., Osceola Mills; George Sinfelt, Carrier P.O., DuBois; Leonard Smeal, Retired, Clearfield; Clark G. Smith, Ins. Agent, Curwensville; Eugene B. Spadaro, Bottler, DuBois; Arthur M. Stewart, Retired, Cherry Tree; James Stiver, Retired, LaJose; Frank Swidersky, Retired, R.D., Houtzdale; Norman L. Thomas, Retired, R.D. 1, Grampian; William R. Tinker, laborer, R.D. 2, DuBois; Marian A. Tomasik, Floor Woman, DuBois. William E. Town, Layout Man, DuBois; Margaret Urish, h.w., Osceola Mills; Larue D. Violanti, h.w., Woodland; Raymond Volpe, Retired, Curwensville; Joseph Washed, Retired, Beccaria; Earl Watson, Potter, DuBois; Floyd A. Welch, laborer, R.D. 2, Clearfield; Pauline Welker, h.w., R.D. Woodland; Dorothy E. Williams, Teacher, Clearfield; Edna F. Williams, h.w., Coalport; Roy D. Wilson, Lineman, Philipsburg; William S. Wilson, Retired, Glen Richey; Lulu E. Wood, h.w., Grampian; Frank I. Wyant, Carpenter, DuBois; Albert E. Yarger, laborer, R.D. 1, Houtzdale; D.A. Yingling, Retired, Clearfield; David E. Yocum, Business Man, Clearfield; John Zartman, Salesman, DuBois.

And if more potential jurors need be called, they will come from the following list:

Mrs. Betty Adams, h.w., Clearfield; Frank B. Alexander Jr., laborer, DuBois; Rosella Bachelier, h.w., Grampian; Robert I. Badman, Retired, Houtzdale; Carl Barquist, laborer, Grassflat; Wilbur Lawson Bloom, Retired, Grampian; Ray F. Bouch, laborer, Mahaffey; William A. Bruce, laborer, Mahaffey; Margaret O. Burt, Reg. Nurse, DuBois; Emma Curry, h.w., Clearfield; Homer Delattre Jr., laborer, Madera; Lawrence E. Dick, laborer, Coalport; Mary K. Divins, h.w., DuBois.

Phyllis DuBos, h.w., Westover; Anna F. Earley, h.w., Winburne; Joseph Evanochko, laborer, Madera; Clara Freeman, h.w., Coalport; Hilma L. Gailey, h.w., Run; Olive Mae Gilliland, h.w., Clearfield; Patrick Gorman, Tax Collector, Osceola Mills; Clair Graham, laborer, Woodland; Martha C. Hall, h.w., DuBois; Norman L. Hanson, B&O Carman, DuBois; Simson Hartshorne, Maint. Man, Philipsburg; Elmer M. Hepburn, laborer, Clearfield.

Hazel Hill, h.w., Grassflat; Ann P. Hillman, Retired, Curwensville; George A. Holt, Retired, Clearfield; Frederick P. Hoover, laborer, Curwensville; Sue M. Houser, h.w., Clearfield; Kathleen A. Hudson, h.w., Clearfield; Naomi Hurd, h.w., Mahaffey; Mary Husak, Factory Worker, Curwensville; Herbert T. Johnson, laborer, Munson; Robert J. Johnston, Barber, Coalport; Pete Kashella, laborer, Munson, Raymond Kephart, Retired, Brisbin.

Mrs. Robert Kester, h.w., Grampian; Albert N. Kitchen, laborer, LaJose; Ellis Kitchen, laborer,

Westover; George S. Kitko, laborer, Madera; Dorothy J. Kline, h.w., Clearfield; Lucy A. Kline, h.w., DuBois; Mrs. Dennis Knarr, h.w., Troutville; Francis H. Lane, Retired, DuBois; Alex Leshok, Clerk, DuBois; Mrs. Charles Lloyd, h.w., Smithmills; Frank M. Lope, laborer, Clearfield; Anna Rose Love, h.w., DuBois; Lois Lukens, h.w., Smoke Run.

James H. Luther, Painter, DuBois; Earl Luzler, Retired, Clearfield; Kathryn McCracken, h.w., Curwensville; Mary A. McDade, Nurse, Falls Creek; Charles H. McGinness, Welder, Clearfield; Louise McKee, h.w., Westover; William P. Maher, laborer, Osceola Mills; Earl H. Maines, laborer, Clearfield; Ellen Mailin, h.w., Houtzdale; Marjorie Marriott, h.w., Clearfield; Steve C. Matko, laborer, Coalport; John Mehallow, laborer, Hawk Run.

George Mendel Jr., Salesman, Hawk Run; Hazel Merritt, Secretary, Clearfield; Mary R. Miele, h.w., Curwensville; Naomi V. Miles, h.w., Utahville; James D. Park, laborer, Penfield; Richard C. Payton, laborer, Clearfield; Evelyn D. Pearson, h.w., Clearfield; Frank A. Pullman, laborer, DuBois; Cloyd H. Putt, laborer, Clearfield; Chester Rachocki, Equipment Operator, Coalport; Vivian Rainey, h.w., Mahaffey; Marain G. Reams, Telephone Operator, Philipsburg; Allen B. Roos, Farmer, Kylertown.

Nancy L. Rutkowski, h.w., DuBois; Viola May Schucker, Clerk, Clearfield; Lee J. Schultz, Retired, Winburne, George S. Shaffer, Retired, Ansonville, Hazel E. Shillane, h.w., Clearfield; William A. Shilenn, Retired, Clearfield; Marion E. Sims, h.w., Frochville; Merle Snyder, Farmer, Mahaffey; Evelyn G. Somerville, h.w., Westover.

John A. Sotak, Retired, Morrisdale; Helen Suplizio, h.w., DuBois; Della Taylor, h.w., Curwensville; Mary Trella, h.w., Brishin; Ernest F. Troxeil, Retired, Mahaffey; Harvey Troxeil, laborer, Utahville; Richard Valimont, laborer, LeContes Mills; Aloysius Valimont, laborer, Clearfield; Mrs. Ivan L. Walker, h.w., Houtzdale; Ruth Walker, h.w., Clearfield; Alex A. Ward, laborer, Clearfield; Mac Weaver, ..., DuBois; Mrs. Ennie L. Williams, h.w., Utahville; Margaret Wilsoncroft, h.w., Osceola Mills; Ernest Wise, Retired, Curwensville; Mrs. Stella Wood, h.w., Philipsburg.

EXHIBIT P-1-h

NO. III TUESDAY—SEPT. [27]

THE COURIER-EXPRESS

Vol. 87-No. 227 Serving Clearfield, Elk and Jefferson Counties DuBois, PA., 15801, Tuesday, September 27, 1966

Dial 371-4200 23 [Pages]

NINE JURORS ARE SELECTED IN MURDER

Yount Leaves Courthouse *Remember old Sarge Gordon*



Shown above are two members of the state police, a deputy sheriff and Jon Yount handcuffed, as they left the Clearfield County Courthouse Monday afternoon at the end of the first day of the murder trial. Yount, former DuBois school teacher, is charged with the slaying of one of his students, Pat Sue Rimer, last April. Escorting the defendant back to the county jail are Troopers Kerr and Gorman, with Deputy Sarge Gordon in the doorway.

Defense Attorneys Leave Court



Appearing above as they prepared to defend their client, Jon Yount, in Clearfield, are Attorneys Homer King of Pittsburgh and David Blakley, of DuBois. The trial was in its second day as the jury was in the process of being selected. *This is a terrible picture of Both-as-King had reddish crew-cut hair & is about 40.*

JUDGE CHERRY IN EFFORT TO SPEED YOUNT PRELIMS.**Bulletin**

As court adjourned at noon today, one additional juror had been selected in the Jon Yount trial, bringing to a total of nine, the number chosen thus far. The ninth juror to be selected was Elmer Kellerman, Bell Telephone Co. wire chief, of DuBois.

At 11:30 this morning as the Jon Yount murder trial neared its noon recess in Clearfield County Court, two additional jurors had been selected, bringing to a total of eight the number selected since the session got underway Monday morning.

A total of 24 prospective jurors received challenges this morning and of this total only two were accepted for duty. They were, Mrs. Faye Sahn, a housewife and mother of three children; and Mrs. Vivian Rainey, also a housewife and mother of four children, of Mahaffey. Six additional jurors had been selected at Monday's session. It was hoped that the six additional jurors might be selected this afternoon, enabling the testimony to get underway Wednesday.

Judge John Cherry, in an effort to speed the preliminaries of the trial, asked a number of questions in the jury selection and urged that there be no undue delays.

Most of the jurors questioned were excused on the basis of their opposition to questioning on capital punishment—when they stated they were opposed to such a penalty, if the defendant should be found guilty.

The courtroom was well-filled with spectators, newsmen and county officials as the session got underway today.

A large number of persons was in the courtroom on Monday when the selection of the first jurors was made.

During Monday morning's session, three of 14 were selected and Monday afternoon 32 more were examined but only three chosen, totaling six for the day.

Picked Monday afternoon were Grace I. Badger, housewife of RD 1, Falls Creek, the 24th person called; Albert E. Yarger, a laborer from Houtzdale, the 21st person called; and Raymond Volpe, a retired worker, from Curwensville, the 16th person called.

Selected Monday morning were Mac Weaver, businessman, of DuBois; Dorsey Neeper, laborer, RD, Curwensville, and Ann P. Hillman, Curwensville.

On Monday, the sixth juror was selected at 2:10 p.m., and none was added after that. Court concluded for the day at 4:45 p.m.

See YOUNT'S TRIAL, Page 2

YOUNT TRIAL

These are the jurors who will decide the fate of the 28-year-old former DuBois Area Senior high school mathematics teacher charged with the murder and rape of Miss Pamela Sue Rimer, 18.

The body of Miss Rimer was found April 28 in a wooded section along a rural road where she walked from her school bus to her home at Luthersburg RD 2.

Police said the attractive high school senior had been stabbed many times and a stocking was wrapped around her neck.

The following morning the defendant appeared at the DuBois state police sub-station voluntarily and said: "I think I'm the man you're looking for."

EXHIBIT P-1-i

IV WEDNESDAY—SEPT. 28th

THE COURIER-EXPRESS

Note headlines says Collapses—& as you read on it says NEAR-COLLAPSE & they say it was ... as she was completely composed in exactly 10 minutes to take the stand again—damn the papers!

No. 228 Serving Clearfield, Elk and Jefferson Counties
DuBois, PA., 15801, Wednesday, Sept. 28, 1966
Dial 371-4200 40 Pages

[M]OTHER OF PAMELA SUE COLLAPSES ON
STAND

TEMPORARY INSANITY MOVE BY DEFENSE?

By GEORGE WAYLONIS
Managing Editor

The distinctions of legal quotients dominated the "prelude" to the Jon E. Yount murder trial in Clearfield yesterday. They were almost quodlibetic.

That prelude consisted of the 104 prospective jurors parading to the stand, and the lazy legal litany recited, first by defense, then by the commonwealth or vice versa.

For the Commonwealth, a jury was wanted that has the courage to impose the death penalty.

For the defense, a jury was wanted that believes that such a thing as temporary insanity exists.

Each side got what it wanted.

And the jury box filled slowly. And after nine had been selected, there was a large discarding of jurors. And after the box was filled, the wholesale discarding threatened again until Judge John A. Cherry called for a side-bar conference. After that, the first of the two alternates was quickly accepted. Five prospects later the last was accepted. The hour was 5:15 p.m. yesterday.

But both sides had appeared to be adamant in wanting jurors with strong convictions. And as the long legal litany was recited, both sides jabbed their point of view into the jurors already selected.

Surprisingly, one-fourth of the jury is composed of persons from DuBois, in which territory the brutal slaying occurred last April 28.

And this was supposedly the territory where passions and emotions were flaming because an attractive 18-year-old honor student at DuBois Area Joint high school was murdered and criminally assaulted. She had been beaten and stabbed many times. Her throat had been cut and a stocking was wrapped around her throat.

DuBois Steady

But it wasn't from the ranks of the 40 DuBois area persons that signs of emotion flowed. Instead, many of the prospective jurors from towns buried in Clearfield County's mountains displayed preconceived notions of guilt.

Today, a jury of six men and six women began hearing testimony that will seal the fate of the former mathematics teacher at DHS. The 12 and the alternates are:

Mac Weaver, businessman, 711 Maple Ave., DuBois.

Dorsey Neeper, laborer, RD Curwensville.

Ann P. Hillman, State St., Curwensville.

Raymond Volpe, retired, Curwensville.

Albert E. Yarger, laborer, RD 1, Houtzdale.

Grace I. Badger, housewife, DuBois, Falls Creek Rd., RD Falls Creek.

Faye Sahn, housewife, Burnside.

Vivian Rainey, housewife, Mahaffey.

Elmer Kellerman, 413 South Church St., Bell Telephone plant manager, DuBois.

Vanetta L. Kennedy, factory

Temporary

worker, RD 1, Osceola Mills.

Fred Nazimiec, [510] Pifer St., highway inspector, DuBois.

Marion E. Smith, practical nurse, housewife, RD, Frenchville.

Alternates are: Lucille Rose, housewife, Mahaffey; and Naomi V. Miles, housewife, RD Coalport, age 23 and the youngest of all the jurors.

Psychiatry and psychiatrists, apparently, will play a vital part in the defense. This 'new science' continually is being utilized in murder trials throughout the nation. And more and more "experts" in this field are being utilized as witnesses. Knowing the shape of things to come, the commonwealth attorneys quizzed

jurors as to their interest and their reading into the subject of psychiatry.

And the "new look" to the defense still remains an enigma, Homer King, a Pittsburgh attorney, recently joined the defense. He was admitted to practice in Clearfield County court only last week.

It is customary to ask potential jurors if they personally know any of the participating attorneys. And the commonwealth continually referred to "Mr. King ... from Pittsburgh."

And he is looked on as an import from the city, the first to appear in a criminal case in Clearfield County in many years. He is unlike the late Charles J. Margiotti, from DeLancey, Pa., who would take a homicide trial in Jefferson county court just to "visit home" once in a while.

Newcomer

An area daily newspaper described Mr. King as a friend of the Yount family; but the Courier-Express learned that Mr. King is a friend of a friend who is a friend of a friend of the Yount family. An upcoming criminal attorney in Pittsburgh, the Yount family was persuaded to have him join the team of David Blakley, of DuBois, and David Ammerman, of Curwensville, who have been serving as Yount's counsel since his arrest April 29.

District Attorney John K. Reilly, Jr., and his assistant Ervin S. Fennell, Jr., of DuBois, divided the chores of examining the prospective jurors; while Mr. King handled all the duties for the defense. Late

yesterday afternoon, Mr. King was joined by his law associate in Pittsburgh, Frank Sabino.

Jon E. Yount was immaculate in dress, dark suit with white shirt, and a new crewcut. He became animated only when his attorneys huddled to discuss a prospective juror's interest in psychiatry.

Know Police?

Many jurors were questioned about any relationship or associa- ... [with] state troopers, whose organization will spearhead the prosecution. In fact, one of the prospects was challenged by the defense because he was friendly with two troopers in Clearfield, none associated with the case or trial, and whose names do not appear on the list of commonwealth witnesses which was given the defense by the District Attorney.

But a DuBois man, Fred Nazimiec, easily made the panel, and he wasn't queried concerning any police relationship (he has a brother who is a state trooper, stationed at Lawrence Park.)

DuBois area persons called to the stand but not accepted for the jury included: Doris J. Andrulonis, RD Luthersburg; Floyd Frantz, Troutville; Gearhart Hansel, Force; Joseph Prontock, Robinson St., DuBois; Frank Wyant, 221 W. Long Ave., DuBois; John Zartman, 509 E. DuBois Ave.; Frank B. Alexander, 115 E. Park Ave., DuBois; Martha C. Hall, 520 Maple Ave., DuBois; Francis H. Lane, 500 S. Highland St., DuBois; Alex Leshok, 213½ Rumbarger Ave., DuBois; Anna Rose Love, 407 E. Park Ave., DuBois; Helen Suplizio, 707 W. Weber Ave., DuBois.

James Park, of Penfield, was called but was AWOL. It was learned he had become ill and he was excused by defense and the prosecution, after his name had been pulled from the box by Prothonotary Archie Hill. The Judge concurred.

Judge Cherry apparently expects the trial to be completed this week because jurors excused from this case have been ordered to return for other cases on the criminal docket, scheduled to begin next Monday morning.

Strict rules are in effect in the courtroom. Newsmen are forbidden to leave the courtroom while the trial is in session. All picture-taking in the courthouse was also banned by Judge Cherry. He ordered the courtroom cleared Monday noon during the lunch recess, pointing out he did not want spectators bringing their lunches so they will not lose their seats in the 100-seat courtroom.

A bit of evidence, to be used in the case, was taken to Pittsburgh last night under state police guard. The nature of the evidence was not disclosed.

NO KIN

There were few spectators yesterday. Prospective jurors occupied much of the seating.

None of the Yount family was in the courtroom during the jury selection. The defendant's attractive sister met him at the doorway downstairs as he was being escorted back to the county jail. His parents were waiting for him at the jail. Tuesday is a visitor's day.

None of the jurors questioned told of reading national publications which featured the Yount-Rimer case in recent editions. The majority had only read local area publications. The defense had attempted to delay the trial until the interest in the "inflammatory" article in a New York publication had subsided. This request for a delay was denied by the judge last week. The article had contained inaccuracies which had been ... by persons associated with or near the investigation.

Ages of children and grandchildren came into prominence. This was asked of most jurors. After all, the age of the murder victim was 18.

Read the Courier-Express

UNABLE TO FACE YOUNT AS RECESS CALLED
BY JUDGE

Mrs. Lavonne Rimer, mother of Pamela Sue Rimer, DuBois Area High School girl who was brutally slain near her Luthersburg home last April 28 as she was returning from school, became hysterical on the witness stand at Clearfield this morning and was in a state of near-collapse as she was assisted to a court-anteroom.

As her steps were directed past the defendant, Jon Yount, former DuBois High School teacher who is accused of the slaying, she cried "I can't go by him," and she was directed from the courtroom by a more circuitous route.

The court was thrown into pandemonium as Mrs. Rimer screamed in her agony as she was first ap-

proached by Attorney Homer King, a member of the legal staff defending Yount. She had previously been questioned by District Attorney John K. Reilly and it was while Mr. King approached the witness-stand that Mrs. Rimer cried out, partially collapsed and was led from the courtroom.

Protesting to State Police Detective Edward Kerr and Court Crier Louis Hudslek that she could not pass in front of the defendant, her steps were directed along another aisle.

Following the unexpected commotion, Judge John Cherry called a brief recess. — *10 minutes*

Mrs. Rimer appeared as the second witness this morning, following on the stand Corporal John Magas of the state police, who presented 22 photos taken at the scene of the crime in Brady township.

Mrs. Rimer was then called to the stand and questioned by Prosecuting Attorney Reilly as to the location of the Rimer home, and of her first concern over Pamela Sue's late return from school. The family first became fearful that something might have happened to their daughter when Mr. Rimer, after a brief search, found Pamela's books along the roadside. It was at that point that neighbors and police were notified, resulting in finding the 18 year old girl's body, beaten and slashed, a short distance from the roadside.

Jon Yount, one of her teachers at Senior High, spent the night at his home on the outskirts of DuBois and turned himself in to state police early the following morning.

He is charged with both murder and rape.

Local and visiting newsmen are not permitted to leave the courtroom at Clearfield except for short recess periods.

Mrs. Rimer's collapse on the stand occurred this morning shortly before 11:00.

Scheduled as the third witness of the morning was Mrs. John Poidya, grandmother of the slain girl.

Mrs. Rimer was to resume her appearance for questioning by defense attorneys before noon.

EXHIBIT P-1-j

NO. V THURSDAY—SEPT. 29th

THE COURIER-EXPRESS

[Vol.] 87-No. 229 Serving Clearfield, Elk and Jefferson
Counites DuBois, PA., 15801, Thursday, September
29, 1966

Dial 371-4200 24 Pages

[P]ATHOLOGIST CALLED IN RIMER MURDER
TRI[AL]

*Unger withdrew all his statements later & he testified
the girl was still a virgin but that a little Hanky Panky
had taken place (no doubt with her boy...*

FRIENDS-NEIGHBORS DESCRIBE PAMELA SUE
AS MODEL GIRL

By GEORGE WAYLONIS
Managing Editor

Defense Attorney Homer King was quick to grab every opportunity to prove the social life of Pamela Sue Rimer, for whose murder Jon E. Yount is charged and today is standing trial in the Clearfield court.

Her life and habits had been impeccable, authorities had been told after her bludgeoned body was found on a hillside last April 28, near her home in Brady Twp.

And Mr. King got nowhere yesterday to show otherwise. Four witnesses he cross-examined upheld the image of Pamela as a girl whose life was devoted to home, studies, 4-H activity and the school band.

Only on Saturday nights, normally, he was told did Pamela Sue have a date—and usually to go to a square dance.

Mr. King had sought more about her social activities from her mother, from Mrs. Emma Zartman, and her daughter, Lona; and Jessica Marshall, of Luthersburg, a neighbor and the last person to see Pamela before she was accosted on the “red-dog” road that led to her farm home.

Before her emotional outburst that broke up the trial briefly Mrs. Rimer related that her daughter never dated during the week, that she was president of the 4-H Horse and Agriculture Club. She had read 15 books for her last term paper and often stayed up to read until 2 a.m., and that frequently she would play her clarinet. She said Pamela had been an honor student since First Grade.

In being cross-examined, Lona Zartman said she had been friends with Pamela for about six years. She

said she knew Pam's steady boyfriend, who lived on a farm near Sykesville and who went to another school. They would double-date occasionally, going to a movie in DuBois. They were together practically every weekend, and had birthday parties practically the same time. They were group parties, she said, and not only couples.

Miss Zartman had been in a physics and trig classes with Pam, and later the Advance Mathematics Course, which was taught by Yount. She and another girl dropped the Course, leaving Pam to be the only girl in the class. She dropped because she had expected to have another instructor other than Yount. She said he was "unreasonable with home work."

Jessica Marshall, 15, a 9th Grader last year, testified to leaving the bus with Pamela and walking a short distance to a "Y" in the road, where they parted, each heading home. In her cross-examining she said they were neighbors but never socialized.

Last Wednesday afternoon District Attorney John K. Reilly called two witnesses who had furnished police with information last April 28 of a blue or green station-wagon, a Rambler or Falcon make, with chrome rack on top, traveling slowly on the road leading to the township road which leads to the Rimer home; and then seeing it return about 20 minutes later at a higher rate of speed.

The two were Clyde Gontero and his 16-year-old son, Larry, of Luthersburg, RD.

They viewed the auto through the picture window of their home, which is located about 100 feet from the roadway. Larry said it had been the only

auto to pass his home in about 20-25 minutes. His father went further and stated the driver had a "darkish coat and white shirt" was in his early twenties or late teens. Mr. King objected to this but was overruled.

It was a short time later that Douglas Rimer appeared at their home and told them his daughter was missing. They joined him to make a search.

Details leading up to the finding of Pamela's body occupied the first day of testimony in the trial. All persons present when the body was discovered were called on to testify.

They include Earl Russell Zartman and his wife, Emma, of Oklahoma who told of two telephone calls from the Rimers telling of the disappearance of Pamela Sue. With their daughter, Lona, they headed to the

See FRIENDS, Page 2

Friends

area.

Enroute to the Rimer house, Mrs. Zartman "noticed something" in the woods. She and her daughter left the auto, and were the first to discover the body.

In her testimony, Lona said she recognized the blue skirt and sweater on the body. Mrs. Zartman testified that Pam was lying on her stomach, her coat up over her back and her panty girdle exposed.

After telling Mr. Zartman to summon an ambulance or police, Lona said she sought a pulse beat

but got none. She did not disturb the body she said. She noticed a "cut on the back of her head, like a half moon." One stocking and shoe were off. She said there were "lots of broken leaves around, like a path down the hill."

Photographs of the body were shown to the girl and she said this was the scene she had seen. These photos were among the 22 identified by Corporal John W. Magas, of Reynoldsville, who is Troop C photographer and identification specialist at Punxsutawney. He said the photos were ordered taken by Trooper Donald Medford of the DuBois sub-station, who is the prosecutor in the case against Yount.

Other photos of a station wagon were shown to the Gonteros. They both replied the auto they had seen the evening of April 28 was similar to the one shown in the photographs.

Also included were two color photographs taken by Robert Young, a DuBois photographer, on order from the state police.

Trooper Raymond Fratangelo, of the DuBois sub-station, told of receiving a call from the Rimers and arriving at the scene 10 minutes later and being met on the roadway by Clyde Gontero and Mr. Rimer. The Trooper told of Mr. Zartman coming to inform them of finding the body.

When he arrived at the body, the girl's grandmother, Mrs. Pauline Poida, of Helvetia, was leaning over the body and sobbing.

Leaving the Zartmans to keep others away, Trooper Fratangelo went to his patrol car and radioed for more troopers.

Six photographs, showing various aspects of the typography of the area, were identified by the Trooper and these were admitted into the record.

Mr. King attempted to withhold entry of the photos of the body from the record but was overruled. Judge Cherry declared they were an aid to the oral testimony.

A change was made during early afternoon in the jury. Juror Elmer Kellerman, of DuBois, one of the 12 was excused because of the death of his father-in-law. Two of Mr. Kellerman's children had been students of Yount. Another DuBoisite on the jury, Fred Nuziemic also had children taught by Yount. Mr. Kellerman was replaced in Seat No. 9 by the first alternate juror, Lucille Bone, housewife, from Mahaffey.

Mrs. Pauline Poida, the grandmother, appeared briefly on the stand to relate she had not disturbed the body. She only held Pam's hand, and kissed it, she said.

Also appearing briefly was Donald Marshall, of Luthersburg, driver of Bus No. 13 on which Pamela Sue was a passenger going home from classes. She had not traveled with him that morning to classes he testified. He told of the two girls leaving the bus between 4:15 - 4:20.

Clearfield County Coroner Ralph Geer, of Penfield, told of ordering the autopsy by Dr. John Unger, local pathologist, at the Maple Avenue Hospital; having the body removed to the Hospital by the Woods funeral home ambulance. He presented a copy of the

death certificate but it was not immediately entered into the record.

Testimony yesterday was completed shortly before 6 p.m. after Cp. Frank Bolick, of the DuBois substation, told of his obtaining items belonging to Pamela Sue which were found by her father along the "red dog" road. They were obtained at the Rimer residence. These included two textbooks, one on Government and the other Advance Mathematics, five cardboard covered notebooks, a wallet, a magazine, a pamphlet, a straw colored plastic handbag, an umbrella, neck piece (a black ... with a music insignia) a left hand glove, neckerchief and her social security card.

The courtroom was half-empty during the morning hours yesterday but teener girls filled the empty seats late in the afternoon.

Wednesday mornings' session opened with Mr. Reilly presenting Exhibit A, a map of that section of Brady twp. in which the investigation was conducted. He generalized the various details of the crime committed. Mr. King objected, saying he was "going too far." This was sustained.

It was then that the District Attorney announced that the Commonwealth was seeking a verdict of first degree to rape and murder.

In opening her testimony, Mrs. Rimer told of returning home from her job as a welder at the Cameron Manufacturing Co., Reynoldsville at 4:50, and her daughter was not there. It was then she made the first call to the Zartman's, and to Jessica Marshall. It was then her husband, Douglas, arrived home.

He had with him Pamela's schoolbooks and umbrella which he found along the road. After calling her mother, Mrs. Rimer said her husband telephoned the state police.

During her direct testimony Mrs. Rimer was nervous, and sobbed frequently. Her voice was weak and almost inaudible.

Mr. Reilly turned to Mr. King and offered the witness for cross-examination.

Mr. King walked toward Mrs. Rimer and was stunned when she rose from the witness chair and became hysterical. Her mother, (Mrs. Poida), rushed to her side, as did the Court Crier Louis Hudsik. Mrs. Rimer squirmed and screamed as she was led by the defense table where Yount was seated. State Police Detective Ed Kerr turned the trio around and shuttled them from the court room via the judge's chamber.

The jurors were immediately taken from the courtroom.

After the emergency recess Judge Cherry told the jurors to dispel from their mind what they had heard. After a side bar ... Cherry told the jurors to weigh first ...

When Mrs. Rimer returned to the witness stand, she maintained her composure. Mr. King asked his questions from a position near the defense table.

He asked whether Mrs. Rimer had visited Mrs. Yount's home in July 1966. *Yes she had.*

This developed another conference by the attorneys and judge. After it, Mrs. Rimer was dismissed

from the stand. No further clarification came, nor to the statement Mr. King had asked Mrs. Rimer if she had made.

The defendants' parents and sisters were in the courtroom. Douglas Rimer, father of the ...

REPORTS DETAILS OF DEATH

Dr. John Unger, pathologist at the DuBois and Maple Avenue Hospitals in DuBois, was scheduled to take the witness stand shortly before noon today, to describe the results of an autopsy performed on the body of Pamela Sue Rimer, 18 year old victim of last April's slaying near her home at Luthersburg. Jon Yount, former DuBois High School teacher is charged with the slaying, and is on trial at Clearfield for murder and rape.

Dr. Unger was regarded as a key witness of the commonwealth and it is anticipated that his testimony would cover in minute detail the results of his examination of the body.

He followed to the stand four members of the Pennsylvania State Police force, who described being called to the scene of the slaying and the results of their investigation. Presenting their testimony under the questioning of District Attorney John K. Reilly were Detectives John George, Kenneth Bundy, Donald Bedford and Ed Kerr. Their testimony was almost in duplicate, as they were led through the details of being called to the area near the Rimer home, of their preliminary investigation during the early evening hours, of finding the young victim along the roadside with her throat cut and badly beaten body and of the removal of the victim to the Maple Avenue Hospital.

It was at that time that Dr. Unger was called to the hospital and conducted his examination.

Dr. Unger was expected to confirm the state's contention that the young victim had been raped during the course of the attack, her throat slashed and the body otherwise beaten. It was expected that his testimony would be continued after the noon recess.

The courtroom was filled to capacity this morning as Judge John Cherry called for the commonwealth to continue its testimony. It was noted that the crowded courtroom consisted mostly of women and teen age friends of Pamela Sue.

EXHIBIT P-1-k

NO. VI FRIDAY—SEPT. 30

THE COURIER-EXPRESS

Vol. 87-No. 230 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Friday, September 30,
1966 Dial 371-4200 12 Pages

[P]OLICE TELL OF FIRST CONTACT WITH
YOU[NT] "I KILLED HER"-IS

[P]OLEMICS MARK QUESTIONING OF
PATHOLOGIST

" I KILLED HER"-IS ADMITTED

The story of Jon Yount's first admission that he had any part in the death of Pamela Sue Rimer and of his subsequent arrest, came to light this morning when

detectives of the DuBois State Police sub-station related the details of the defendant's appearance and reported confession early on the morning of April 29, last.

Troopers Edward Kerr and John Phillips described how they were awakened at 5:45 on the morning following the slaying of Pamela Sue near her home in Brady township—and of the initial conversation with the former Senior High School Math teacher.

Trooper Phillips, first witness on the stand this morning for the commonwealth said he was awakened by a loud knocking on the door of the barracks—opened it and asked "Can I help you?"

"I'm the man you are looking for" replied the individual at the door, according to the trooper.

"I then asked him to repeat his message" said Detective Phillips, "which he did."

"I awakened Detective Ed Kerr and we again heard his statement."

Under cross-examination by Defending Attorney Homer King, Detective Phillips denied that the defendant had said "I think I'm the man you are looking for."

Detective Kerr then took up the story on the stand.

"Why are we looking for you?" he said.

"I killed that girl" said Yount.

"What girl?"

"Pamela Rimer."

"How did you kill her?"

"I hit her with a wrench and choked her."

"This is a very serious crime. You have a right to call an attorney."

"I couldn't sleep—this is a police matter. If I wanted an attorney I would have gone to one."

"Did you tell anyone about

See I KILLED, Page 2

I Killed

this?"

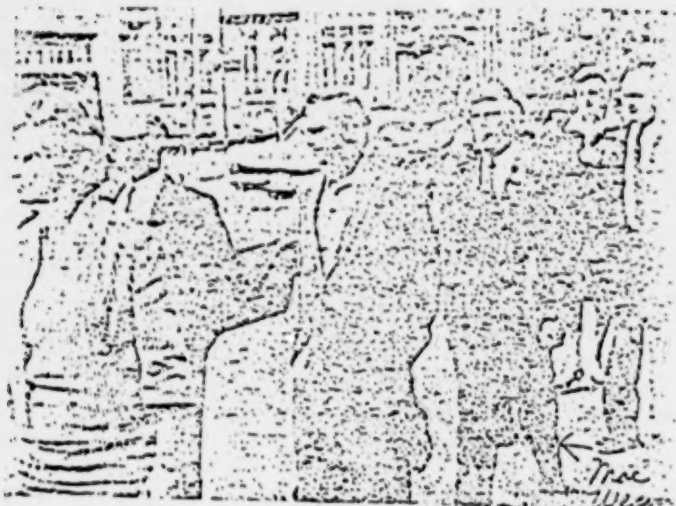
"My wife."

Detective Kerr when questioned stated that the defendant appeared to be calm and collected at the time. He spoke in a moderate tone of voice and did not appear to be excited.

In continuing the story of the first contact with the defendant Kerr stated that Detective Kenneth Bundy, District Attorney John Reilly and Attorney David Blakley, the latter representing Jon Yount appeared on the scene a short time later.

Cross-examination of Detective Keer was then started but was brought to an abrupt halt by a point of law as to the rights of the defendant and a sidebar conference was called by Judge Cherry shortly after 11:00 a.m.

Jurors Are Escorted To Courtroom



Members of the jury in the Rimer murder trial are shown as they are being escorted back to the Clearfield County Courtroom after their lunch recess period Thursday afternoon. Several DuBois jurors may be identified in the scene.

UNDER FIRE 6 Hours

By GEORGE WAYLONIS
Managing Editor

A soft-speaking pathologist was a one-man army yesterday, advancing the commonwealth's case against Jon E. Yount, who is being tried for the murder and rape of Pamela Sue Rimer.

As the trial in the Clearfield County court moved into its third day, it was Dr. John Ungar, of Brookville, who carried the prosecution.

He was on the witness stand six of the eight hours that testimony was taken Thursday.

And for two of those six hours, he was under the sharp cross-examination of Defense Attorney Homer King who is aware that the testimony of Dr. Ungar is the keystone of the commonwealth's case against the 28-year-old ex-DuBois Area high school mathematics teacher, charged with criminally assaulting the 18-year-old honor student and bludgeoning her to death.

For it would be the pathologist's findings concerning the cause of the death, and his determination of rape that would go far in determining guilt.

His testimony would be tantamount with the testimony that will come later from Trooper Donald Bedford who will eventually relate how Jon E. Yount came to the DuBois sub-station early the morning of April 29 and said: "I think I'm the man you're looking for," after which he offered a statement in which he related details of his meeting Pamela Sue Rimer on the red-dog road leading to her rural home near Luthersburg.

For that reason, the defense attorney was barking more, but was he biting?

His continued cross-examination, often times quite lengthy, upset the time-table of the commonwealth. For that reason, presentation of their case is taking longer than expected. It had been hoped to complete the commonwealth's case Friday, but District Attorney John K. Reilly today could see it now extending far into Saturday. Judge John Cherry said yesterday he plans to continue court on Saturday.

In the cross examination to date, very little new information was added to the record.

The probing of Pamela's social life was expected and a natural thing to seek out, but it produced nothing new.

Defense Attorney King barked loudly when he learned that

See UNDER FIRE, Page 2

Page Two

Under Fire

Detective Kenneth Bundy did not have a copy of the report from the State Police Crime Laboratory, Harrisburg, in his possession. The Defense Attorney wanted to see it and could it be possible for Detective Bundy to have it in court before the end of the day.

This backfired because he apparently had forgotten that an opportunity to examine the report had been made to the Defense. The report had been examined by David Blakley, of DuBois, of the defense staff before the trial started.

Proceedings opened Thursday morning with Trooper John George telling of assisting Cpl. John Magas in the taking of photographs. Another of the many photographs was admitted into the record, and another denied.

Detective Kenneth Bundy told of obtaining the items of clothing from Pamela's body as each was removed by Dr. Ungar prior to the autopsy.

Two other troopers testified briefly, to maintain the continuity of the commonwealths' case, as Mr.

Reilly said. They were Donald Bedford, the prosecutor and Detective Edward S. Kerr. Mr. Bedford told of escorting the ambulance carrying the body to the hospital; while Mr. Kerr told of interviewing Mr. and Mrs. Rimer.

Dr. Ungar's testimony was interrupted when Douglas Rimer, the murdered girl's father, was called to the stand to open the afternoon session. He had been scheduled to testify earlier in the week but was excused.

It had been requested he take the stand. And it was brief. He told of driving his daughter to school on the morning of April 28. And of finding her school-books and personal belongings scattered along the red-dog road, about 1200 feet from their home. There was no cross-examination of Mr. Rimer.

The oral testimony of Dr. Ungar was jam-packed with countless details of his findings during the autopsy which was conducted at the Maple Avenue Hospital.

But his oral testimony failed to include everything that had been included in the written report of the autopsy and this was the center of polemics between the witness and the defense attorney. This report, incidentally, was not entered into the record because of an objection which was sustained by Judge Cherry.

An example of an omission was mention of slight wounds around the thighs, which was not included in the written report. Dr. Ungar countered that he had expected photographs to be introduced that would show these wounds. He added that he did not have

the photographs on hand when the report was prepared.

As the cross-examination continued a verbal battle between Dr. Ungar and Mr. King ensued, with the exchange of opinions regarding findings of pathologists.

After one verbal battle, the jury was taken from the courtroom after which Judge Cherry read into the record that the Defense council had prevented Dr. Ungar from consulting his autopsy report during his oral testimony. All the while, the Defense had a copy of the report on its desk. After this recess, Dr. Unger had his report on his lap.

The defense was emphatic in having the pathologist reiterate that the only clothing missing from the body of Pamela was a stocking and a sneaker. All her garments, including her undergarments, were intact on the body when it was received in the autopsy room of the hospital.

Dr. Ungar denied adding or subtracting any facts from his findings. He pointed out to the defense that certain chemical tests were made after the autopsy was concluded; and it was impossible to include all in the initial report which was dictated during the actual post mortem.

In opening his testimony at 1:15 p.m. Thursday, Dr. Ungar related how he removed each article of clothing, and in turn, presented each to Detective Kerr who labeled each, and latter, with Sgt. Harry Ellenberger boxed the items at the sub-station. These later were taken to the Harrisburg crime laboratory for examination.

Continuing his testimony, Dr. Ungar said Pamela's hair was severely matted, due to blood. After separating the hair, he uncovered wounds of a "peculiar type." All the wounds, he said were confined to the left side of the head, with the exception of one on the back of the head. The wounds were "ragged and sharp, if you can conceive something like that," Dr. Ungar testified. These could come from a sharp and blunt instrument, he said.

Wounds on the scalp were the first to be inflicted, Dr. Ungar contended. These were on the left side of the scalp. There were contusions on the left forehead and the left side of the face. His examination of the brain, toward the front and the back, showed considerable bleeding deep into the boney vault of the brain. He found evidence of brain damage he said, with small bleeding scattered over the brain. This is the type of damage occurring in boxers, he compared.

There was no skull fractures, he pointed out emphatically, and this point was renewed later by Mr. King in his cross-examination.

Continuing, Dr. Ungar said small wounds were noted along the left forehead and face, which were different than those on the skull. These, he said, were inflicted by a blunt instrument.

He told of removing the stocking from around the neck, where it hung loosely, and which had two knots. The stocking was frayed, almost to a point of breaking, he testified. But, he added, there were no marks on the skin around the neck.

Wiping away "froth" at the neck, he uncovered three incisions. These were different than the other

wounds, as if inflicted by a sharp instrument. The first, he said, crossed at the Adam's Apple region but did not reach the air passages. Slightly below that was another that went into the "wind pipe." And the third carried into the "voice box." She was alive when these wounds were inflicted, Dr. Ungar contended.

The lungs were heavy, he said, and contained much blood.

The items of clothing were identified by Dr. Ungar. Despite identified by Dr. Ungar. Despite items were admitted as evidence.

EXHIBIT P-1-1

NO. VII SATURDAY—OCT. 1st

THE COURIER-EXPRESS

-No. 231 Serving Clearfield, Elk and Jefferson Counties DuBois, PA., 15801, Saturday, October 1, 1966
Dial 371-4200 12 Pages

[Y]OUNT STORY TELLS OF ATTACK ON VICTIM
STRUCK PAMELA SUE WITH WRENCH AND ...
STATE WILL CONCLUDE CASE TODAY

Victim of Attack



The above is a picture of Pamela Sue Rimer taken for the 1966 D.H.S. Year Book which has not yet been released to students. Pamela Sue was an honor student at the DuBois Area High School and was due to graduate one month after her brutal slaying.

DEFENSE OPENS MONDAY

The Commonwealth is scheduled to complete its testimony today in the case against Jon Yount, former DuBois Area High math teacher, charged with the brutal slaying of one of his students last April 28, 18 year old Pamela Sue Rimer of Brady township.

It was expected that Attorney Homer King of Pittsburgh and Attorney David Blakley would open the case for the defense when the murder trial resumed at Clearfield Monday morning.

First witness on the stand this morning was Peter Kennis, 18 year old son of Mr. and Mrs. Peter Kennis of the Sykesville-Troutville area. Peter, a graduate of the Reynoldsville-Sykesville high school in the class of

1966, reported that he had been escorting Pamela Sue to square dances in Grampian Saturday nights or to an occasional movie in DuBois for more than a year.

He was asked by the defense if he had been intimate with the victim at any time and he replied "emphatically not. I respected her and we were just the best of friends." *He didn't answer like that at all - He said - "why - No - we knew we ...*

Dr. John Ungar, pathologist at the two local hospitals, was recalled to the stand and questioned as to the head wounds on Pamela Sue when he examined her at the autopsy. He reported that there was considerable blood on the wrench and that the head wounds had undoubtedly been inflicted by such a blunt instrument.

Detective Kenneth Bundy reported that mud found on Yount's car during the investigation was the same as that of the red dog road, where the crime was committed.

Lieutenant Christian Bumbartner of the crime laboratory in Harrisburg reported finding traces of human blood on the defendant's coat, on the car seat of his car and on Pamela Sue's underclothes. *One little spot.*

Harold Portzer, DuBois car dealer, told of the sale of the station wagon to Yount - the car in which the attack was reported to have taken place.

Shortly before the noon recess it appeared ...

Defense

fore the jurors by the end of the day.

It was doubtful that any defense testimony would be started today, with the likelihood defense attorneys would make their presentations with the opening of court Monday.

With summations yet to be presented it was generally anticipated that the case would be concluded and go before the jurors about Wednesday of next week.

**STRUCK PAMELA SUE WITH WRENCH AND
THEN 'WENT BLACK'**

By GEORGE WAYLONIS

Managing Editor

Mountains of evidence—from the pen and lips of Jon E. Yount himself—were stacked expertly by the Commonwealth as it headed down the home-stretch in its case against the 28-year-old former DuBois Area high school mathematics teacher, charged with the rape and slaying of Pamela Sue Rimer.

The sockdolagers were a troika of statements from the defendant himself, obtained by state troopers and District Attorney John K. Reilly only hours after the father of two turned himself in at the DuBois sub-station.

1.) Jon Yount provided police with a statement, prepared in his own handwriting, which linked him to the crime.

2.) Drew a diagram, in his own hand, showing police the route he had traveled to the Brady twp. scene and where he had tossed away a wrench.

3.) An oral statement by Yount, taken in shorthand by Mrs. Dorothy Campbell, the district attorney's stenographer, was read into the record not once but twice because the defense attorneys insisted she read from her original shorthand notes.

In that oral statement, Yount elaborated still further concerning his actions the evening of April 28 when the bloody body of the honor student was discovered on a wooded hillside about a half mile from her home.

This is the first major trial in Clearfield County since the "New Procedures" of investigation were used; and commonwealth scored on every count.

The statement in Yount's handwriting was introduced during the testimony Friday afternoon by Trooper Donald Bedford, the prosecutor in the case. This is the same statement which was read by the Trooper last May 1 when Yount was formally arraigned before a DuBois alderman.

Although objected to, the statement easily was accepted into the record.

But the oral statement, as recorded by the stenographer, had tougher going because Mrs. Campbell casually mentioned she had made a "rough-draft" of her shorthand notes. Defense Attorney Homer King pounced on this opportunity, demanded the commonwealth made the "rough-draft" and original notes available. The defense scanned the shorthand notes.

The jury appeared to listen with extra attention as the stenographer slowly read from her

notes. Then the District Attorney had her read the official draft. There was very little difference.

"Are you a school teacher?"

"I was."

"You have a right to an attorney."

"I haven't decided on one."

"Anything you may say may be held against you."

"It's all there in My Report (his written statement).

And then he told his story to the county prosecutor. How he and a couple teachers thought about ... and where they could hunt and fish 15 or 20 years from now. He was going to the midwest to school for four years and...

Struck

he said. He had known she lived in this area. He knew where most of his students lived, from talking to them.

She got upset when he asked her to go for a ride. "Naturally she would," he said. He added that he became panic stricken and reached for the wrench. He had had trouble with a burning casing on the gun and had thrown the wrench under the seat with a sandbag after hunting woodchuck on Monday. He told of hitting her a couple or three times. She started running through the field, and he watched her and he didn't think he could catch her. "She was pretty hysterical," he related. But she fell and he reached her.

He said he couldn't get through to her. "I went black," he related, "I was so weak I could

hardly stand up." He went back to his car, spotted his wrench shining on the ground. He almost stumbled over it. He picked it up and later threw it away along the road between Luthersburg and Rockton. "I don't know why I did it or anything I did," he said.

He remembered his coat and trousers being bloody. He burned everything but his suit. He put on another suit and picked up his children at the babysitters, and took them to his mother's home.

"It seemed as if it did not happen and any minute I would wake up" he said, but he realized he wasn't dreaming when his wife told him the "police were looking for a car like yours." He later awakened his wife and told her what had happened.

"There was no use running away. I had to face up to what I had done." He told his wife to tell his parents.

Asked if he had relations with Pamela, Yount replied: "I don't believe. I don't think I could have, I was so weak. It wasn't my intention. I must have suggested something like that in the car because she became so upset." Had he been in the area looking for her? "No." He had seen "for sale" signs on some lands in that area.

Asked how he was treated by the troopers, "They have been very kind men. The officers have been gentlemen." Did they make any promises? "No."

-0-

Nothing additional was brought out in the cross-examination.

Detective Kenneth Bundy told of obtaining the Yount Rambler station-wagon at the home of his parents in Sabula where his wife had driven it.

Various parts of the auto—the front seat, door glass, upholstery cover—were identified by Mr. Bundy.

These items, along with the clothing items from the body of Pamela Sue, have been identified. And they will be identified again when the representative of the State Police Laboratory at Harrisburg testifies today.

Trooper Bernard Gorman told of discovering a suit stuffed behind a board in a barn adjacent the Jon Yount property in the Gelnet Section.

He also testified to finding the wrench, and showing it to Yount. He said Yount identified it as his own. The search and discovery of the wrench was made May 1 as troopers were taking the suspect to Clearfield County Jail after the formal arraignment in DuBois. Mr. Gorman also removed ashes from a stove at the Yount place, but could not identify them. "They are just ashes," he remarked.

Friday's court opened with Dr. John Ungar, a pathologist from Brookville, completing his testimony. he repeated parts of his earlier testimony, concerning the cause of death. This, essentially, he said, was caused by loss of blood which flowed into the lungs. This can be likened to "drowning in your own blood," he said.

Trooper Bedford, in beginning his afternoon's testimony, told of having Yount empty the contents of

his pockets soon after Yount's statement to them that "I'm the man you're looking for."

Among the contents of the pocket was a small knife. This Bedford retained and turned over to Detective Kenneth Bundy, who was in charge of various pieces of evidence.

The courtroom was at near capacity throughout the day. About 90 percent of the onlookers were women. Families of both the defendant and the victim continued to attend.

EXHIBIT P-1-m

VIII MONDAY—OCT. 3rd

THE COURIER-EXPRESS

[Vol.] 87-No. 232 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Monday, October 3,
1966

Dial 371-4200 16 Pages

[Y]OUNT WILL TESTIFY IN OWN DEFENS[E]
DEFENSE SEEKS TO PUNCTURE TIGHT CASE

By GEORGE WAYLONIS
Managing Editor

Unable to puncture the air-tight case while being constructed by the Commonwealth, defense attorneys today can be expected to pioneer a new route to pull Jon E. Yount from the spectre of the death penalty.

And they have their work cut out.

For four days District Attorney John K. Reilly and his assistant, Ervin S. Fennell, carried out the continuity of the case against the brilliant mathematics teacher at DuBois Area Senior high school, charged with killing one of his students, Pamela Sue Rimer.

Using nearly 90 exhibits, the prosecution, in echelon, built its case the hard way, following new procedures outlined by recent supreme court rulings.

Defense won the duels of "objections" but the commonwealth won the war-of-words. Commonwealth witnesses, mostly state troopers, were perfect. Never once were they shaken from their original testimony. The very capable defense attorney, Homer King, made continual stabs where he thought there might be an opening but his pointed questions glanced harmlessly into vacuums, free of doubt.

Each phase of the commonwealth's case was continually reinforced with corroborating testimony and evidence.

Before completing its case at 2:00 p.m. Saturday, the commonwealth unfolded the testimony of Lt. Christian H. Bomberger, of the Harrisburg crime laboratory. He had examined countless items, from the clothing of the victim to parts of the station wagon owned by Jon E. Yount, and also items of clothing of the defendant. In some cases, Type B blood was noted, its other human blood, and in others "just blood." Some of the exhibits were tossed out after objections from the defense. But the Commonwealth had shown how thorough it has been in preparing its case.

Because this is a case of a schoolteacher being charged with the murder of one of his pupils, the trial has been commanding attention nationwide. Radio networks, plus news associations, have been following the progress of the trial.

And Judge John Cherry has maintained the judicial decorum of the trial. There has been no carnival atmosphere as in the Aljoe trial particularly when families would gather gayly for a sack lunch in corridors or anterooms.

Corridors were guarded by sheriff's deputies. The usual courthouse loafers were absent. Former DuBois Mayor P. B. Dillman, on special duty, handled a post at the spectator's entrance.

The last witness Saturday was

See DEFENSE, Page 2

Defense

Lt. Donald Cutting, of Reading, who was at the Punxsutawney headquarters on April 28, the day of the crime. He told of going to the scene to insure that the investigation apparatus was in gear. His appearance as a witness was asked by the defense but they had no questions for him.

During Saturday morning's session, Dr. John Ungar, the pathologist, was recalled to the stand and was handed a wrench and asked if such an instrument could make the type wounds he found on Pamela's skull. He answered: "In my opinion, yes." The defense asked if that was a mechanical opinion and not a medical opinion. Dr. Ungar replied "... a medical opinion."

And the garter belt and panties of the victim returned to the testimony. At the time of the post mortem, Dr. Ungar reported seeing no traces of blood on either, but Lt. Bomberger stated he had discovered B type blood on both items. *One spot*

The Harrisburg trooper chemist also testified to testing the undershorts of the accused and finding a "little blood" on the front of the trousers.

The bone-handled boy-scout type pocketknife, obtained from Yount, produced no presence of blood, the chemist testified.

Detective Kenneth Bundy testified to making plastic casts of tire marks in the red-dog road.

Speculation was intense as to what course the defense would take to erase the impact of the evidence and testimony against Yount.

Sandy-haired Attorney Homer King has shown signs he can be ebullient in the courtroom. And this he is expected to be when he begins calling his witnesses today.

The testimony of a psychiatrist is a foregone conclusion. But what else?

The trial is obtaining prominent space in Pittsburgh newspapers, Mr. King is from Pittsburgh.

From indications, Mr. King will recall Mike Kennis, of Sykesville Rd, to the stand. This 18-year-old had been dating Pamela Sue for about two years. & *the nite before*.

In his cross-examination Saturday, Mr. King had brought out that the youth had driven Pamela Sue

home from classes on the afternoon of April 27, the day before her death. Mr. King showed there was no one at the Rimer residence at that hour—the mother was working at a Reynoldsville plant and the father at a construction job. But Mike testified he escorted Pamela to her door and then returned to his auto and drove to his home. As Mike left the stand, Mr. King was heard to say softly to himself: "We'll hear from you later." But if he calls the youth, he'll be stuck with his testimony, and not be able to cast any doubt on it in the summing up to the jury.

And what impact did the emotional outburst of Mrs. Douglas Rimer make on the jury the opening day of testimony?

This opines that Mr. King will summon the mother of Yount to the stand, to quiz her of her son's youth, his desire for an education and his subsequent high status in mathematics which lead to his being awarded a special scholarship at the University of Montana.

Home influences can become a strong factor in unfolding the personality of Jon E. Yount, brilliant mathematics teacher, age 28, charged with the rape and murder of one of his students—an honor student since the first grade.

Gaining sympathy for Jon E. Yount could very well be the major objective of his defense today.

WIFE ON STAND THIS A.M.

Jon Yount, charged with the death of 18 year old Pamela Sue Rimer, is due to take the stand either Tuesday—or Wednesday at the latest—according to his chief defense attorney, Homer King, of Pittsburgh.

This was indicated this morning as the defense opened its case to save the life of the former DuBois Area High School teacher, facing the death penalty in the slaying of Pamela Sue Rimer, one of his students on a lonely road near her home in Brady township, seven miles east of DuBois.

Appearing on the stand this morning as one of the principal defense witnesses was Mrs. Ruth Yount, the alleged slayer's wife, who told of the events leading up to the tragedy and of the developments in the Yount household immediately thereafter.

Mrs. Yount took the stand at 9:30 a.m. and for nearly an hour, under the direct questioning of Mr. King, related the story of her courtship and marriage; of the fact that her husband had frequently suffered severe headaches and attacks of hives; that he had been in an automobile accident April 3 and had complained of severe headaches after that period; that on the evening of April 27 (the day before the murder) Yount had turned off the television which she was viewing with a curt remark "Don't do that again;" that on the morning of the slaying he had awakened with a severe headache, requiring a compress applied to his eyes, that he had awakened her at 4:30 a.m. on the morning of April 29 and told her "I think I'm the man they are looking for." He was nervous and crying at the time, according to Mrs. Yount. He then told her "I have to go to the police."

Previous to the time Mrs. Yount was called to the stand, Attorney King had opened the case for the defense, calling on the jury to "view the whole man" in speaking of the defendant. He stated that his client would be called to the stand as part of the defense

case and that he would be asked to repeat his previous statement that he swung at Pamela Sue but thereafter had "blacked out and remembered nothing."

Other witnesses scheduled to be called are Yount's parents, several doctors, Mr. Van Sice a neighbor, and friend with whom he was planning to purchase land in the Brady township area.

The Clearfield County court room was again well filled this

See WIFE ON, Page 2

Wife On

morning as the defense opened its case.

Mother On Stand

Mrs. Caroline Yount, mother of the defendant was on the stand this morning shortly before noon. She testified that her son, Jon, had fallen down the stairs of their home at the age of 4 years and had injured his head severely. He had been taken to a doctor and his injuries treated. She also testified that he had suffered from hives and asthma as a child.

She reported that her son had come to her home about 8:30 p.m. (about three hours after the slaying) had sat on a couch and stared into space. She asked him what his trouble was and he replied "I'm sick." He left shortly thereafter and said he was going to his own home.

Judge Cherry called for a recess shortly before noon.

EXHIBIT P-1-n

No. IX TUESDAY—OCT. 4th

THE COURIER-EXPRESS

Vol. 87-No. 233 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Tuesday, October 4,
1966

Dial 371-4200 24 Pages

YOUNT HAS BRAIN DEFECT, REPORTS
SURGEON

BRAIN DAMAGE AS CHILD

At the time Jon Yount was examined by a neurosurgeon in his office in Pittsburgh July 6 last, he had a definite brain defect—the same defect from which he was undoubtedly suffering April 28, when he is alleged to have killed Pamela Sue Rimer, 18 year old Brady township girl and a former student of the defendant.

That was the crux of a statement made by Dr. Yale David Koskoff, Pittsburgh brain specialist as he appeared on the witness stand at Clearfield this morning and was questioned by defense attorneys. In his opinion, and as a result of encephlogram tests taken last July, Yount is definitely suffering a brain defect as the result of injuries suffered as a child, and was not completely responsible for his actions of last April 27 when he is alleged to have raped, beaten and stabbed to death the DuBois Area High School honor student on a lonely road near her home.

For a period of two and one half hours this morning Dr. Koskoff was questioned under direct examination by the defense and was then awaiting cross-examination by District Attorney John Reilly as the noon recess approached.

Electric impulses of Yount's brain were made in the encephlogram tests and indicated extreme sensitivity in the temporal lobe, according to Dr. Koskoff's testimony, resulting in partial lapses of memory and borderline epilepsy. This borderline epilepsy and memory difficulties would not have proven troublesome from an academic standpoint—in which field Yount was considered to be an outstanding mathematician.

"These changes come in outbursts" said the Pittsburgh brain specialist "and cause loss of memory at times." The state is expected to indicate that Yount suffered from loss of memory during the attack and was not responsible for his actions at the time.

The defendant is said to have

See BRAIN DAMAGE, Page 2

Brain Damage

suffered an injury as a four year old child when he fell down a flight of stairs, and thereafter suffered continuous headaches.

Tracings taken during the extensive tests by the surgeon revealed tendencies usually normal in a child, but not in the brain or actions of an adult, according to the testimony.

The jury requested additional information of a specific nature and huddled with Judge Cherry, the

defense and state attorneys shortly before the noon recess.

Jon Yount spent most of Monday afternoon in his own defense and was not recalled to the stand this morning.

Additional defense witnesses were scheduled to be called during this afternoon's session.

YOUNT ON STAND-DESCRIBES EARLY SICKNESS AND BLACKOUTS

CANNOT RECALL HIS POLICE STATEMENTS

By GEORGE WAYLONIS

Managing Editor

Jon E. Yount has a bowling average of 165-170.

It was Wednesday evening, April 27—his night for bowling. But he didn't feel good. He had a head ache. He tried to get someone to substitute for him. But he could get no one, so he bowled.

And he returned to his Gelnet home after bowling. His wife was watching the late movie. He walked over to the TV set and snapped it off.

"Don't turn it on again," he said. She didn't. And they retired for the night.

He had another headache when he awoke the following morning—Thursday, April 28.

That is the strange incident to which Mrs. Ruth Yount testified yesterday morning as the defense of the 28-year-old ex-DAHS mathematics teacher was started. And his blond petite 25-year-old wife, mother of his two children was the first witness.

And in a surprise move, Jon E. Yount, himself, was called to the stand early Monday afternoon. He remained there all afternoon, until court recessed for the day, shortly after 5.

He was asked about that shutting off the television set. Asked by District Attorney John K. Reilly if he remembered, he said "Not really," and he hadn't remembered doing it before.

And that is the way it was with much of Yount's testimony during the cross-examination. He wasn't recalling yesterday what he, himself, had written in his own handwriting of his meeting Pamela Sue Rimer on that red-dog road in Brady twp. April 28; or the oral statement he had given the district attorney's, several hours after he voluntarily appeared at the DuBois state police sub-station.

And he was confronted with lines from the court transcript, of Sept. 19, 1966, concerning his conversation with Detective Edward Kerr soon after arriving at the sub-station. He disputed this stating that he poised the statement "I killed that girl?" as a question and not as a statement. The District Attorney countered saying the structure of the sentence didn't allow for a "question-mark quotation."

From the opening remarks to the jury by Defense Attorney Homer King, it was apparent the defense would bring out the full personality of the defendant. "The chapters in a man's life are many and varied—even in a young man of 28," Mr. King said.

Illness was the perennial companion of Jon E. Yount. To this his wife testified. To this his mother testified. And to this he testified.

This is the way it was from the start. His mother, Mrs. Caroline Yount, said he wasn't a healthy baby. They had had a hard time getting the correct formula for him.

And at age 4, he fell down 12-13 basement steps and hit the front of his head on the concrete floor. Several days later his eyes began to swell. He was taken to Dr. Lewis, who said the boy had hives. Later on, the mother said, "he got asthma real bad." She testified he came home frequently from school with a headache, or nauseated.

And later he was taken to Dr. Sargeant, in Falls Creek, and tested for allergies. He was found to be allergic to 20 items. And while a junior in high school, he was bedfast two weeks. Asthma was the reason, his mother testified.

The highlight of the afternoon came when Jon E. Yount took the stand and told the highpoints of his life:

After graduating from Sandy high school in 1956, next came two years at the DuBois Campus, and two more at State College. He started in 1959 for his master's degree and received it in 1965. He taught mathematics, mostly geometry; and chemistry a couple years.

He remembered vaguely his grade school life; and having missed much school because of hives. "I have hives on my body at this time" he said.

And he told of going to church since he was old enough to go. He usually told his mother where he was going or what he was doing. That was his home training.

Since April, he testified, he had frequent neck pains, which he believed resulted from an auto accident in New York State on Good Friday April 8, 1966. He, and another teacher, John Schultz, were enroute for two days of fishing at Catherine Creek. While stopped at a traffic sign, his station wagon was hit from behind. His head hit the door frame and he was almost snapped into the back seat.

He testified he couldn't move his neck for several days. Pains at the base of the skull began developing. No, he said, he did not seek medical aid. "Just put it off and off," he testified. "Momentary blackouts" also began developing he said.

And then he told of April 28, going to the Goodrich plant to see his wife, and then going to Brady twp. to look over possible "shooting lands."

He told of recognizing Pam Rimer along the road. And then stopping and asking about lands for sale. He remembered saying to her: "As we ride along, will you point out this (property) to me." She became upset, he testified, and said "stop the car, she'd walk home."

She was saying something, he testified, and it "dawned on me that I'd better talk to this girl."

He said he held onto her coat, and she started to fight, and swinging her umbrella. He said he had a wrench in his hand. "I don't remember picking it

CANNOT RECALL, Page 2

Cannot Recall

up." he testified.

"What was the next thing you recall?" he was asked.

"Running." he answered.

As he was giving this testimony, Lona Zartman, of RD DuBois, girl friend of Pamela, and the first person to come upon her body rose from her seat in the spectator section. As she sidled from the bench row, she was staring at Yount on the stand. She left the room.

Continuing, Yount told of turning his car around. He noticed spots of blood on his shirt and suit. "Couldn't put two and two together," he testified.

Arriving home, he threw his white shirt and t-shirt into the blazing fireplace. He later stretched out on the bed.

During his testimony, he spoke freely, without too much hesitance. His voice was clear and crisp.

Before going to the sub-station, he had told his wife: "For some reason, I think I'm the man they're looking for."

And at the station, he said, he was "pretty confused." He said "the fellows (troopers) were telling me things that happened that I didn't know.

Asked by Mr. King if he had had relations, he replied: "No sir, I did not."

Asked if he intended her harm, he replied: "I intended this girl no harm."

At the start of the cross-examination, he replied he had no trouble in school, either with grades or

teachers. In fact, he skipped a grade and ended in grade and high school education in 11 years.

When his mother was on the stand, she said her son went to church services and Sunday School regularly and had played the piano in Sunday School for five years. But when he was cross-examined by Mr. Reilly, Yount said he didn't go to church Easter Sunday, two days after his auto accident while on the fishing trip. He added that he hadn't gone to church in the past year, but when he was younger, he had always gone.

In answer to Mr. Reilly's question, the defendant said he began having "partial blackouts" and a "dizziness as if you are going to faint." And he told of "seeing spots before my eyes." He said he told no one of his problems in this regard. "Did you keep them to yourself?" "Yes," he answered.

He denied knowing Pam's school bus, route or time it stopped near Pam's home.

When quizzed about his handwritten statement and the oral statement, Yount became legalistic, avoiding any assumptions. He continually said he didn't know what had happened concerning the tossing away of the wrench and the burning of his shirts.

Asked why he didn't burn his suit, he replied: "I'd like to know answer to that myself." He had owned only two suits, he said:

Later, he said he had "no concept" of events on April 28. He denied that his conscience was bothering him. Instead, he said, he went to the sub-station for two reasons: 1. "suspected that I had done something"

and 2. "I was hunted and what was it that I had done."

The district attorney remarked that Yount was not remembering what he did, but was remembering what he did not do. He didn't deny that he had written the statement or had given the oral statement. He said the police were making suggestions of things he had done and he was agreeing with them. "They had me convinced," he said.

During his testimony, red blotches were noticeable on Yount's forehead.

Concerning a possible liaison, Yount said he didn't do it because "I don't remember doing it."

He was shown photographs of the field in Brady twp.—and the body of the victim as it was found. Concerning the first, he said: "It doesn't mean anything to me," and to the second, he said: "I don't remember anything like that."

Judge Cherry concluded the session for the day after Mr. Reilly had asked how a question mark could be placed in the quotation which Yount disputed. The defendant replied: "There isn't too much of this that makes sense."

The defendant's testimony, apparently, is the prelude to the expert testimony scheduled for Tuesday when a psychiatrist and a neuro-surgeon are expected to testify concerning the headaches and blackouts to which the defendant frequently mentioned. As Mr. King said in his opening, the doctors will tell of examinations and the "illness this boy has."

His wife told of their early marriage, in the months after January, 1955 when they went hunting, fishing and bowling together. She told of his frequent complaints about headaches. She had advised him to see a doctor but he said: "They'll go away."

Mr. Reilly handled the duties alone. His assistant, Ervin Fennell was absent from the table.

The courtroom was at capacity long before the session started. Many were turned away throughout the day. Of the audience, about 97 percent were women.

The mother of the victim and the mother of the defendant had their first meeting, it was brought out in the testimony of Mrs. Caroline Yount.

Mrs. Douglas Rimer had stopped at the elder Yount's home near Sabula last July. Each broke into tears, Mrs. Yount said. They discussed their children briefly. That was all Mrs. Yount said and Attorney King didn't inquire what else was said. *Vet!*

EXHIBIT P-1-o

No. X THE COURIER-EXPRESS

Vol. 87-No. 234 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Wednesday, October 5,
1966

Dial 371-4200 24 Pag[es]

MEDICAL-LEGAL BATTLE CONTINUES AT
T[RIAL]

As C-E Correspondent Views Trial



A rough sketch of the Yount trial by Joan Swigart, Courier-Express correspondent, as she sat in the courtroom at Clearfield Tuesday afternoon. Photographs are not permitted in the courtroom by Judge John Cherry. The view shows the defendant, Jon Yount, sitting with his attorney, Homer King and several of the 12 man jury.

DEFENSE CASTS SHADOW

A medical as well as a legal battle was continuing to unfold in Clearfield County Court today as attorneys for Jon Yount, accused of the slaying of 18 year old Pamela Sue Rimer, continued their fight to save his life.

Defense and commonwealth attorneys countered with legalistic maneuvers as they offered expert

testimony in their efforts to prove that the defendant is legally sane—or that he was not responsible for his actions on the day of the murder—that Pamela Sue had been raped either prior to or after her death—or by the defense that the young high school honor student had not been sexually molested during the attack—or such an attack might have been committed the previous day.

Appearing as the first witness this morning for the defense was Dr. Cyril Wecht, chief forensic pathologist for the Allegheny County Coroner's office, of Pittsburgh.

Under questioning by Chief Defense Counsel, Homer King, Pittsburgh criminal trial attorney, Dr. Wecht testified that "This girl may not have been raped at the time of the attack as judged by the factors appearing in the state's pathology and autopsy report." He was referring to the report submitted previously by Dr. John Ungar, pathologist at the DuBois and Maple Avenue Hospitals, who examined Pamela Sue's body after death, and indicated that it was his opinion that she had been raped during the course of the attack and that she had been beaten about the head and had suffered other slash wounds which combined to cause her death.

The defense hammered at this autopsy report this morning.

Dr. Wecht said "The autopsy report does not contain a single item mentioned of superficial wounds to the abdomen region, pelvis or thighs of the victim—nor were there any stains on the victim, on her underclothing or clothes, which would indicate that

she had been sexually attacked. The body was not torn in any degree."

Dr. Wecht was asked a question specifically on the Ungar autopsy report as to "whether it would be unusual for an expert

See CAST SHADOW, Page 2

Cast Shadows

pathologist to overlook such wounds or stains." His reply was "Yes, it would be highly unusual for this to happen and not to be mentioned in the report."

Dr. Wecht testified that male sperm which the autopsy report showed were on the body could have been deposited there some 18 hours prior to her death. This would place the approximate time as the night before the murder or early Thursday morning, the same day on which Pamela Sue was attacked and murdered.

It was expected that the defense would recall a friend of Pamela Sue's to question him about taking the victim home in his car the afternoon before the ...

TENSION GRIPS COURTROOM AS TRIAL NEARS CLIMAX

DEFENSE HOPES TO EASE PENALTY

By GEORGE WAYLONIS
Managing Editor

There has been a quiet escalation to the Jon E. Yount murder trial.

This was evident yesterday as both sides moved in their heavy artillery. It was the Artillery of the Articulate. Never before in Clearfield County judicial history has a larger group of medical men been assembled to testify in one trial.

There was a tinge of tension and velvet drama as these men were thickening the witness area with a density of standing room only which has prevailed for days in the spectator section.

This trial now is one of major proportions; and public and professional attention. Every trial where a life is at stake is of major proportions but this one is becoming prominent because this one is attracting more from the ... defenses—psychiatry, psychology and forensic medicine.

Just how wide the medial strip is between medical men will undoubtedly begin to unfold late this afternoon in the Clearfield County courtroom where Judge John Cherry is still very much in solid charge.

Defense Attorney Homer King made giant strides yesterday as two of his medical witnesses gave firm support to the testimony of Jon E. Yount a day earlier.

On that day it was only the Younts—wife, mother and defendant—telling of headaches, asthma, and hives—and what affect it had on the 28-year-old ex-schoolteacher, charged with the murder and rape of one of his students, 18-year-old Pamela Sue Rimer.

Medical Men Called

But yesterday two medical men came from the famed medical center in Pittsburgh's famed Oakland

sector to back up everything that Yount had told the jurors a day earlier. These two medical men took up the entire court day yesterday.

And there are more to come. This means the trial will be extended and the jury now will not have the case until about Saturday.

While the defense was mobilizing its ramparts for Yount, the commonwealth brought in its medical corpsmen. From the Warren State Hospital came three men. Drs. Arthur Heshino, Eugene Cease and Howard Reinhard. They were the first medical specialists to examine Yount after he was formally charged. And they saw him within a week after Yount had voluntarily walked into the DuBois state police sub-station and said he thought he was the man they were looking for.

A trio dispatched from the Warren State Hospital for one trial? This alone is unique. In previous cases in Clearfield—Jefferson county area, only one medical witness from Warren was used. But these are the men who pronounced Yount mentally competent to stand trial. The trio arrived early to hear the testimony of the defense's first two witnesses, who are professionals of tantamount status.

And Dr. John Ungar, of Brookville, also returned to listen yesterday afternoon. He is the veteran pathologist in this area who conducted the post mortem on the victim and testified at length last week.

Call Pathologist

It is expected that the defense will call its own pathologist for an opinion on the findings of that post

mortem. And this pathologist is expected to be a combination attorney-pathologist who has figured in many cases recently in the Pittsburgh area.

His testimony will be designed to desintergrate the charge of rape; as the two defense witnesses yesterday were attempting to soften the degree of guilt for murder. The Commonwealth has been asking for the death penalty.

The courtroom again was filled to capacity yesterday. There was SRO but Judge Cherry only allows enough persons in the court room for which seating is available. At the noon recess yesterday, many held on to their prize seats rather to leave for lunch.

And 18-year-old Mike Kennis of the Sykesville area has been called to be "on deck" as a witness. He had testified earlier for the commonwealth because he was the boyfriend of two year's standing of Pamela Sue. He had driven Pam home from school a day before her death. This should figure in more probing by the defense later.

As a result of the trial, Mike's beginning his school year at Penn State has been delayed.

From all indications, he won't be called to the stand until the defense has called its own pathologist. And this will place Mike in a VIP witness category, as far as the defense is concerned.

Medical terminology was the order-of-the-day yesterday, and it occupied the entire day. Judge Cherry called several recesses in order to give rest to his very efficient court stenographer.

The gracious Dr. Yale David Koskoff, highly pedantic, told of submitting the defendant to encephalograms. This is the delicate art of measuring electric impulses from the brain.

From the tracings obtained from this test, and his subsequent consultations with a psychiatrist concerning case history, he diagnosed Yount as having a disorder of the temporal hypothalamic neuronal system of long stand, and chronic brain syndrome. In other words, this is a non-specific disturbance of the brain involving nerve cells—this of long standing.

Fall Is Blamed

It was his opinion this stemmed back to the time of Yount's fall down basement stairs at the

See DEFENSE, Page 2

Defense

age of 4 or earlier. It was his opinion that the condition can be treated by medication and under the direction of one person, a psychiatrist.

Dr. Koskoff was strong in his belief that Yount's condition would make him incapable of knowing the nature and quality of his act, particularly the April 28 incident. And Yount had this condition on April 28, Dr. Koskoff contended.

In the cross examination, he admitted encephalography can produce an untrue picture but procedures today are extremely accurate. He admitted that Yount's action could occur again and could be dangerous to others as well as himself.

He said that hives and asthma alone could not produce the condition that affected Yount. These, coupled with chronic brain syndrome, could and did.

District Attorney John K. Reilly pointed out this condition had never manifested itself before. The brain specialist said that Yount had over-control, but there was a break through when the impulse was initiated. He reported that Yount had no brain tumor. He also said a cardiogram was taken along with the brain test to insure that his brain machine was not picking up other impulses.

The second half of the one-two punch introduced by Defense Attorney King was Dr. Sherman W. Popchapin, who, in the end of his testimony, declared that it was his opinion that Yount was temporarily insane on April 28—from the time the “explosion occurred” in Jon Yount in his automobile parked on the red dog road near the Rimer home, and until he discovered himself lying on the ground in a field near that red-dog road, and he saw a wrench lying nearby.

It was during this period, Dr. Popchapin declared that Yount did not know the difference between right and wrong. He said, however, Yount’s mental condition was not such that he would remember the details 12 hours later and then forget them several months later.

And Dr. Popchapin believed that Yount, when he testified on Monday, was “enjoying it too much.” This is abnormal, the Pittsburgh psychiatrist declared.

Fierce Cross-Examination

Even in the face of fierce cross examination from the District Attorney, psychiatrist Popchapin held his ground.

Did Yount pick up his hat and wrench, burn his clothing, place his suit in a neighbor's barn, wipe blood from the automobile, to conceal his guilt? Dr. Popchapin said "no" at first but later relented to "it is possible" ... it could."

The appearance of Drs. Koskoff and Popchapin in this trial is their first appearance at any murder-rape trial in which they offered testimony. It was brought out that Dr. Popchapin is a friend of the Defense Attorney King since college days.

They were the first medical authorities to back-up Yount's contention of his "black-outs". Because he had never received medical treatment for the disorder, no DuBois area physicians could be called in his defense.

The two doctors referred to each other to substantiate their knowledge of Yount's personal history. The psychiatrist had examined Yount five times, a much longer period, he said, than in most cases he has. He said that Yount had a superior IQ, and that Yount had no mental safety blocks in which a person can reject "bad events" from memory. He termed Yount's response on April 28 as a "psychotic rage reaction." And, he said, he was firm in the belief that Yount "has been telling the truth when he says he remembers or does not remember."

Attorney King pointed out that when Dr. Popchapin interviewed Yount in the county jail, there was

an absent of laces in Yount's shoes and his trousers had no belt.

Dr. Koskoff is chief of neurosurgery at Montiefore Hospital, Pittsburgh, and has practiced in Pennsylvania since 1936. He said he spent more than two hours recording Yount's brain impulses. He had found significant brain changes during light and deep sleep. During such periods, he said, possible hidden abnormalities can be uncovered.

The tracing was admitted as evidence. There was no objection.

EXHIBIT P-1-p

NO XI THE COURIER-EXPRESS

No. 233 Serving Clearfield, Elk and Jefferson Counties
DuBois, PA., 15801, Thursday, October 6, 1966
Dial 371-4200 14 Pages

[CA]SE WILL BE IN HANDS OF JURY FRIDAY
EXPECT EARLY VERDICT

The Jon Yount murder case is scheduled to be placed in the hands of the jury (consisting of 6 men and 6 women) Friday according to reports from Clearfield this morning as commonwealth and defense attorneys prepared to present their summations later today. Yount is charged with the slaying of 18 year old Pamela Sue Rimer last April 28 in a case which is now nearing the end of its second trial week.

At the session this morning the defendant was described as being of a "cautious nature and preoccupied with sex." The description was given by Dr. Eugene Cease, one of two psychologists from the Warren State Hospital who appeared on the stand as District Attorney John Reilly started his rebuttal testimony. The defense had concluded its case Wednesday afternoon.

Dr. Cease disagreed with the contentions of three Pittsburgh medical men and psychiatrists who had previously stated for the defense that Yount was irresponsible for his actions at times, possibly the result of a fall sustained at an early age. He also disagreed with previous testimony regarding evidence presented by the defense in connection with the rape charge against the defendant.

Dr. Cease reported that Yount had a somewhat depressive nature and in his opinion had not operated up to his full mental capacity, but his condition was not regarded as abnormal.

Dr. Hushini reported he could find no evidence of chronic brain damage during the course of his examination and he possessed a good memory, although rather spotty. He had no signs of mental illness.

The entire morning session was occupied by the commonwealth in the questioning of the Warren specialists in an effort to refute much of the evidence and testimony as presented by the Pittsburgh medical and brain specialists.

Final summations are expected to be presented by opposing attorneys this afternoon and the case should be in the hands of jurors sometime Friday.

PARADE OF CHARACTER WITNESSES ARE CALLED IN YOUNT DEFENSE

Present Final Testimony In Effort To Save Defendant

By GEORGE WAYLONIS

Managing Editor

Maybe this elite witness read the wrong newspaper, too early in the Jon E. Yount murder trial.

Dr. Cyril H. Wecht came to Clearfield from Pittsburgh with an insigne that would make any fictional public defender on television envious.

He had won much attention in Pittsburgh newspapers for his participation in many hot cases in Allegheny county. And he has been a foe of the traditional coroner system in Pennsylvania.

And he had been like a one-man infantry for Allegheny County's District Attorney's new-look in investigation.

He was a member of a very elite group—150 forensic pathologists who belong to an association. Half this number were given automatic membership because they had been practicing in this field but he, Dr. Wecht, was in the other half, who had taken exams to gain admittance.

On top of being a medical doctor, he, too, was an attorney—full-fledged. This made him extra-special.

A Pittsburgh newspaper has been giving page one prominence to the Yount trial since Sept. 27, when their first story was printed....

And the story said "...the opening day of trial had been long awaited in this drowsy county seat in the foothills of rural Pennsylvania."

and the story continued "...An informal relaxed atmosphere prevailed in the courtroom and in the corridors of the musty building mouldering under many coats of red paint on its bricks at the corner of East Second and Market Streets."

And the story continued: "Judge Cherry—the only Quarters Sessions judge in this sixth-class county of 85,000 population—greeted the assembled jury panel with "good morning, folks." This is that kind of community and austerity of the court is breached at times."

Early in his testimony yesterday, Dr. Wecht said he had read the autopsy report as prepared by Dr. John Ungar, of Brookville. Did he have an opinion? Yes.

"In my opinion, this girl was not raped."

Factors in his conclusions were: no mention was made of any superficial wounds around or near the thighs; no stains on the body or undergarments. No clothing had been removed or torn.

He was pragmatic in his conclusions.

Was Dr. Wecht to be the philter in Defense Attorney Homer King's program to nip the strong case the Commonwealth had built against the 28-year-old DuBois schoolteacher, charged with murder and rape in the death of 18-year-old Pamela Sue Rimer?

... trooper early last week, as reported then by the Courier-Express).

And he had an opinion on these: based on the extensive disintergration of the deposit, it had been present for around 18 hours, or more.

This would make the time of deposit 2 to 7 a.m.

In the sharp cross-examination by District Attorney John K. Reilly, Dr. Wecht had not examined the body, had not seen any of the photographs.

At one time in the questioning he said "I have the right to qualify my statement." Here was his legal training coming out. Judge Cherry asked him if he were testifying as an attorney or as a medical man. Dr. Wecht quickly said medical.

In his report, Dr. Ungar had stated the deposit had been present between 6-20 hours.

Before long Dr. Wecht's testimony, and the cross-examiner, bogged down in quotations from published legal-medical books; and before long the jury was hearing that such deposits can continue for 48-72 hours; and that there was no way to determine—to the minute—the life of a deposit.

At one point Judge Cherry cut the witness off short.

Later, before dismissing the witness, Judge Cherry asked two questions to clarify points. They were difficult to answer for the Pittsburgh forensic pathologist who graduated from medical school in 1956 and who said he has conducted 2500 autopsies, or about one-a-day.

The apogee for the defense had been reached a day earlier.

Another witness, who had been standing by this week for the defense, was dismissed before the afternoon session. He was Mike Kennis, of near Sykesville.

After that came a parade of character witnesses for Jon E. Yount. Mayor Kenneth Showers, of DuBois, headed the list. Each was on the stand for about two minutes and were asked routine questions.

Others were Norma Hiller, Continuing Education administrator; Edward Trude, industrial engineer; John B. Schultz, vo-tech teacher; William S. VanSice, auto springs worker; John Frederick Muirhead, stone manager; all of DuBois; John Shickling, teacher, Clearfield; J. Sherman Smith, turkey farmer; Mrs. June Carmella, housewife; Norman Lines, maintenance worker; Eugene Cimino, insurance agent; Clair Naugle, retired metal worker; ... William Rensel, school guidance teacher; Jack McCortkle, biology teacher all of DuBois; Walter Gilbinde, advertising salesman, State College; Tony Roy, lumber mill worker; Lary Himes, truck driver; and Mrs. Martha Cimino, neighbor, as many of the others were all of DuBois...

Present Final

wealth began its rebuttal, first calling a policeman from Horsehead, N.Y., but he was excused without testifying; William Rensel and Trooper Donald Bedford, who began explaining Pamela's school schedule. Lona Zartman was also recalled but more legal sidebars and she was excused.

Court was dismissed at 3:30 p.m. ...

... and at that hour Clearfield was not a drowsy county seat in the foothills of rural Pennsylvania

... streets were choked with traffic ... school buses ... coal trucks ... throngs of pedestrians hurrying by...

... a slight rain fell ... glistening on the red paint on the bricks ... the courthouse still was standing ... proudly....

EXHIBIT P-1-q

NO XII

THE COURIER-EXPRESS

Vol. 87-No. 236 Serving Clearfield, Elk and Jefferson Counties DuBois, PA., 15801, Friday, October 7, 1966
Dial 371-4200

EMOTION-CHARGED TRIAL NEAR...

LAST CHAPTER OF YOUNT CASE IS NOW WITH
JURY

By GEORGE WAYLONIS
Managing Editor

The "Jon E. Yount Story" has gone to the jury for the last chapters.

For eight days the legal processes have unfolded, slowly but surely.

And now, on this ninth day, it is already apparent the trial will go down in judicial annals for its legal excellence

The advocates and the judge displayed the professionalism of their profession ... a bright 31-year-old district attorney who has come a long way since his initial contact with a homicide soon after he took office.... a peppery attorney from Pittsburgh, long experienced in civil cases, and ironically, coming to a small courthouse in scenic Pennsylvania to gain impressive status state-wide as a defense attorney ... and a judge displaying a trigger mind in the face of scientific semantics that demanded rulings.

So much rides on the verdict from the jury of seven women and five men. A man's life! And what part of the emerging sciences—psychiatry, psychology, forensic pathology—will play in future trials.

Tension ripped through the principals participating in this living drama for eight days.

And it was no surprise defense attorney Homer King, in ending his one and a half hour summation, choked in his emotions—and his final words were drowned in his sobs.

He hurried back to his chair at the defense table and cried.

Suddenly, he had realized, he could do no more.

It can be reported now that this nearly happened on several occasions during the past eight days. But his emotional pitch was noticed only at the prosecutor's table, and possibly the jurors.

In his summation, Mr. King said Yount had gone to the police with this question in his mind: "If I did do it, why did I do it?" And if he didn't know the nature and quality of the act, he couldn't be held

responsible; and, it follows, he doesn't know if it is right or wrong.

There is a fair preponderance in the evidence of a brain defect, Mr. King said. And the defendant's general reputation is shown by the 18 witnesses.

The criminal assault charge, he declared, was the weakest that has ever been presented. No testimony of liaison was ever presented. The police, the doctors, heard nothing of this from the defendant. The commonwealth must present evidence in this respect, for the burden of proof rests on the commonwealth. Circumstantial evidence is real and lawful, he pointed out, but this bids that other facts must exist. In this respect, he pointed to the items forgotten to be inserted in the post mortem report. "The report of April 28 was honest," he declared, "and why isn't it honest now?"

Softly, Mr. King explained that he didn't wish to malign the victim or one of the witnesses. Did something wrong happen, he asked? This he would leave to the jury to decide.

He reviewed various testimony about the incident along the red dog road, and how Yount undoubtedly viewed this sudden change in his life when his was a life of high morality.

His condition, Mr. King said, was the reason for disposing of the wrench and hiding his clothes. Blood, he said, was foreign to the life of Jon Yount. "Why didn't he throw away the knife?" he asked, adding—he made it available voluntarily to police.

Not by fashion or prejudice does a jury decide, but on the basis of the evidence presented,

Mr. King declared. And he pointed out some witnesses would color their testimony, others would not. This was for the jurors to decide.

Vegetative illness has a psychiatric effect, and Jon E. Yount has a brain defect, Mr. King emphasized. "This is of the illness, part of the disease."

District Attorney John K. Reilly's summation lasted an hour. He first called on the jurors said their task will be dependent on 95 percent fact and five percent common sense.

The most important person in the case, he said, is not in the courtroom. But, he said, we don't know everything that had happened but that common sense can fill the voids. Particularly, he said, what occurred in the station wagon. Pamela Sue Rimer naturally would get upset by what the defendant had said to her in the car.

It was her threats to tell "the proper authorities" that caused Yount to panic, Mr. Reilly said. And panic is not legal insanity, he declared.

He declared the assault came on an unconscious girl. This is the important ingredient in the charge, he added. The parts of the story forgotten by Yount were disputed by the district attorney. "This is not so."

Mr. Reilly emphasized the defendant had to be in close proximity to the victim to bloody his shirt, his t-shirt, and suit coat and trousers.

Two of the witnesses and the victim are not on trial, he continued. The attack is one, he said, that "I cannot condone."

He pointed to the report of the State Hospital doctors and inclination of the defendant toward sex. And the burning of the clothing items, and tossing the wrench away enroute home was a move to hide his guilt.

He said to the jury that if they didn't believe the assault charge, "it is still first degree" because he contended that it was pre...

Yount Trial

hill, and then saw her fall, "probably groggy" from the blows on the head. Fearing for his reputation as a teacher, he went after her. "This is premeditation." Mr. Reilly charged.

Not in possession of his faculties? Rubbish, Mr. Reilly added, saying he is normal as anyone in the court room. Did they blame a condition on a fall at the age of 4? He pointed out it is normal for boys that age to fall from trees, porches and stairs.

"The defendant suffers from Sanka syndrome," Mr. Reilly declared "—instant insanity to escape punishment."

And since then he has been absolutely normal, the district attorney said, and adding "normal for 28 years and insane for one hour?"

"Others persons have hives, asthma, headaches. Is he legally insane? Syndomes always remain but Jon. Yount is all right now... All he needed know that it was wrong to take a life."

And in conclusion, Mr. Reilly said "supressing memories too terrible to remember—this is not legal insanity."

-0-

Ironically, the testimony of Dr. Arthur Hoshino, psychiatrist at Warren, disputed the findings of the neuro-surgeon Dr. Yale David Koskoff. At one time Dr. Hoshino was a student of Dr. Koskoff. And the Warren doctor disputed the full value of encephalograms—measuring electric waves from the brain—because the attachments are not inside the brain, where the action is.

It was Dr. Hoshino's opinion Yount knew the quality of his deed if he was in the condition that he was when he was examined for a 10 day period early in May.

The psychiatrist said Yount had aggressive impulses, an average IQ for a college student but he was a superior student. "He has drive and energy and he gets it some place," Dr. Hoshino declared.

The Yount report taken by Dr. Hoshino (of Japanese heritage) is confidential. He pointed out that the district attorney was not told of any of their findings; and the entire report was not testified to yesterday.

Dr. Harold J. Reinhard, another psychiatrist at Warren, was the last to testify. He told of a short interview with Yount a few minutes after his arrival at the hospital; and telling of a staff meeting at which Yount appeared.

When Yount appeared at the state hospital, he weighed 190 pounds. Today he weighs about 175.

Eugene A. Cease, the psychologist, said Yount's emotional factor was one "reacting to the mercy of his

emotions." He termed the defendant having drive, ambition, being impulsive, and eccentric, deveation from normal popular norms, and "explosive tendencies."

Homer King's wife was present at the summation, as well as a law associate from Pittsburgh; and a law friend from Greensburg.

Several motions were placed in the record.

The rebuttal by the commonwealth was ended at 11:47 a.m. And the last summation was completed at 4:20 p.m.

The Jon E. Yount story had been told.

YOUNT'S FATE IN HANDS OF JURORS

A jury consisting of seven women and five men will hold the fate of Jon Yount, DuBois man charged with the murder of 18 year old Pamela Sue Rimer, in its hands this afternoon as it begins deliberations on the vast amount of testimony presented during the eight days of the trial.

Judge John Cherry charged the jury this morning in his final summation, in which he outlined five possible verdicts that might be returned;

1. Not Guilty.
2. Not Guilty by means of Insanity.
3. Guilty in the First Degree.
4. Guilty in the Second Degree.
5. Voluntary Manslaughter.

Judge Cherry then explained in detail the basis on which the various verdicts might be returned; a not guilty verdict if jurors believed he was not responsible in any degree; not guilty by means of insanity, calling for incarceration in a mental institution; guilty in the first degree—which would call for additional testimony to determine the extent of guilt and the penalty to be

See YOUNTS FATE, Page 2

Yount's Fate

imposed; guilty in the second degree which would call for a prison sentence of from 10 to 20 years or voluntary manslaughter, in which the crime was committed in a rage or passion.

Judge Cherry pointed to the fact that this was the duty of the state's attorneys to prove the defendant's guilt as such and the duty of the defendant to prove in the minds of the jury that their client was not of sound mind at the time the crime took place.

It was reported from Clearfield that the case would be concluded and placed in the hands of jurors by noon.

EXHIBIT P-1-r

NO XIII

THE COURIER-EXPRESS

Vol. 87-No. 237 Serving Clearfield, Elk and Jefferson
Counties DuBois, PA., 15801, Saturday, October 8,
1966

Dial 371-4200 12 Pages

YOUNT IS GUILTY; GIVEN LIFE TER[M]

DEFENSE MAY SEEK NEW TRIAL FOR CON-
VICTED SLAYER

CLEARFIELD, Pa. (AP)—Defense attorney
Homer King says he will decide in the next several
days whether to move for a new trial for Jon E.
Yount, sentenced to life imprisonment Friday for
murder and rape.

King said he would review the trial before
deciding what further defense action to take. He has
several days to file an appeal.

Yount, 28, was convicted Friday in the death of
Pamela Sue Rimer, 18, a student at DuBois High
School, where he was a mathematics teacher.

The Clearfield County jury of seven women and
five men returned its verdict about an hour after it
had begun deliberations.

Yount, who is to go to Western State Peniten-
tiary, was returned temporarily to Clearfield County
jail.

A crowd of several hundred persons lingered outside the old red courthouse to await the verdict. They mingled with the Friday night shopping crowd as Yount was placed in a car and driven to jail.

Before leaving the courthouse, Yount was permitted to talk briefly with his wife, parents and sister in the courthouse anteroom.

Yount leaned on a counsel table with one hand and let his head sag in the palm of the other hand when the jury brought back its verdict.

After hearing more testimony and statements by attorneys for the commonwealth and for the defense, the jurors again retired, this time to determine whether to give Yount life imprisonment or death. They were back in a half hour with their decision.

Judge John A. Cherry, who presided at the trial, which lasted almost two weeks, delivered a four-hour-long charge to the jury.

The defense contended Yount was temporarily insane the day Miss Rimer was killed.

The state contended that Yount, a father of two, made an improper remark to the girl, she became agitated, and Yount panicked and killed her.

Her body was found in a wooded area near her Luthersburgh R.D. 3 home. She was beaten and stabbed.

SPARED DEATH IN QUICK VERDICT



Jon Yount, former DuBois Area High School math teacher was sentenced to life imprisonment late Friday afternoon by a Clearfield County Jury for the brutal rape-murder of one of his students last April 28—Pamela Sue Rimer, 18, of Brady township. Pamela Sue was an honor student at D.H.S. and was due to graduate with her classmates within a month after her death.

DEFENDANT TAKEN TO PITTSBURGH FOR IMPRISONMENT TERM

By **GEORGE WAYLONIS**
Managing Editor

A fellow with a red and black checkered shirt and a bright orange cap leaned out the window of his car at the corner of E. Second and Market St. as twilight shrouded Clearfield yesterday.

A purple haze enveloped the courthouse.

"Hey, what's going on?" he queried a by-stander.

"The Yount trial is over," a teener-boy exclaimed.

"Oh..." said the hunter, probably a bow-and-arrow nimrod heading to his hunting lodge for the weekend.

Minutes later, the sidedoor opened. A state police phalanx emerged. Jon E. Yount was in the middle. They headed to a car 15 feet away.

As the crowd of more than 300, restrained by police, surged forward, the Sheriff's Car sped away.

And within hours, Jon E. Yount was heading to the State Correctional Institution at Pittsburgh.

He is there today, being processed and ready for classification, and then to a penal institution. His life has been spared by a jury of seven women and five men.

At 6:30 p.m. he had been sentenced by Judge John A. Cherry to life imprisonment, minutes after having been found guilty of murder in the first degree and the rape of Pamela Sue Rimer, a Luthersburg honor student in his advanced mathematics class at DuBois Area high school.

His attorneys have four days in which to file motions or to seek a new trial. It is believed they will file motions.

Before whisked away he bid farewell to his family in an anteroom. Present were his parents Mr. and Mrs. Elveen Yount, his sister Jane, of Sabula; his wife, Ruth, and another person.

After 3 p.m. yesterday, events began to move rapidly. The jury had first left the courtroom at 1:23 p.m. after hearing a three and half hour charge by Judge Cherry.

Lunch was awaiting them in the jury room. And shortly after 2 p.m., their deliberations began ... the climax to the trial which had lasted two weeks.

At 3 p.m. the jury was reassembled in the courtroom and Judge Cherry again defined the various verdicts possible and to answer four questions asked by the jurors: They were:

1.) Is a written list of exhibits (evidence) available? This was defined because the list is used only for the convenience of the court. 2.) wanted a written list of possible verdicts (this was denied. 3.) photographs showing the wounds on the victim and a photograph of the defendant (they were supplied with the stipulation they be returned after serving their purpose. 4.) definition of the crimes (Judge Cherry again listed the various verdicts possible).

At 4:30, Court Matron Shirley Bigney, of DuBois, heard the knock. The jury was ready. Court Crier Louis Hudsik was summoned and court was convened. There were only seven persons in the room. In addition to three women with Mrs. Douglas Rimer, mother of the victim, Jane Yount and a close family friend, Mrs. June Carmella. The other members of the Yount family were summoned. Court was in session again ... at 4:40 p.m.

Mac Weaver, of DuBois, the jury foreman, announced they had a verdict. It was delivered by Clerk of Courts Archie Hill to the judge.

After reading it, he summoned the attorneys and explained that the verdict was incomplete. It probably read: "Guilty as charged."

At 4:31, *got there figures messed up again* — Judge Cherry instructed the jurors to return to their deliberations and determine the degree of guilt.

Less than three minutes after filing into their room, the knock from the jury room was heard again. They were filing back in the court room at 4:40.

Jon E. Yount was ordered to rise and face the jury.

The courthouse clock was tolling 5 p.m. as Foreman Weaver read the verdict: "guilty of murder and rape in the first degree."

There were about 35 persons in the courtroom. The 25-year-old wife of the defendant began sobbing. She was aided to a side room by Trooper John George as Defense Attorney Homer King asked that each juror be polled. Each was.

For the first time during the trial, the shoulders of the muscular Jon Yount sagged, but he remained calm. Mrs. Rimer was weeping in a seat in the far corner of the room.

This meant that more testimony would be presented in order to better orient the jurors who now had to fix the penalty.

Both counsels decided against further testimony. They had no more evidence or witnesses. Each then addressed the jury for about 5 minutes.

In his address, District Attorney John K. Reilly said the supreme penalty should be evoked only rarely but this he said was one time it should be evoked because an 18-year-old girl was murdered and raped. He spoke softly without persuasion.

In his plea, Attorney King said the trial had dissected the life and soul of Jon E. Yount, to show the causes of what made him do what he did. What's to be accomplished by your next decision, he asked? The defendant had lived an exemplary life. "This is something that I wish you'd consider at this time. I wish we could bring Pam back

See DEFENDANT, Page 2

Defendant

and take his life. But you can accomplish nothing further by taking his. He is not mean, ugly or a bad disposition." The doctors told how these things happen. They said this is treatable. He crossed the barrier ... the real from the unreal ... By sparing him, you may allow him to atone for his actions."

And as he asked for mercy, Homer King was again sobbing before the jury.

The fixing of the penalty took only 15 minutes. They reached the verdict at 6:12 p.m., and court was convened four minutes later. Yount rested his head in the palm of his left hand.

In a clear, but soft voice, Foreman Mac Weaver read: "Life imprisonment." That was 6:21 p.m.

As Attorney King conferred with the Yount family, Judge Cherry expressed the appreciation of the court for the manner in which the jurors carried out

their duties. "These duties," he said, "are not simple; they are difficult ..." The jurors were excused.

The sentence had been imposed. It called for separate and solitary confinement and "treatment by the Commission."

During the charge, Judge Cherry explained the law and reviewed the testimony.

Conflict in testimony, he said, had to be resolved by the jurors. Phrases like "I think I'm the man..." or "I am the man," or "I killed that girl" or "I think I killed that girl."

And he pointed out the difference in the testimony of the pathologists. The Pittsburgh pathologist could only testify to Dr. John Ungar's report while Dr. Ungar, in his oral testimony, told of forgetting to dictate the thigh wounds into the report; and that he had photographs taken of those wounds, which he felt, would better explain the wounds.

Court house observers had never in contemporary history seen such a large crowd to watch the departure of a convicted man from the courthouse.

After the verdict, Mrs. Rimer said she had nothing to say.

Onlookers at Market and Second drifted on ... janitors began their work in the courthouse ... state troopers, court personnel, friends and loved ones melted into the darkness of their waiting cars.

What had happened along the red dog road near Luthersburg last April was now judicial record.

EXHIBIT P-1-s

XIV *How bout these head-lines? & our dear local pathologist wouldn't handle the case—but as usual Waylonis comes up with some pretty nice excuses for Dr. Ungar.*

THE COURIER-EXPRESS

87-No. 238 Serving Clearfield, Elk and Jefferson Counties DuBois, PA., 15801, Monday, October 10, 1966

Dial 371-4200 16 Pages

MORE DETAILS OF YOUNT JURY DELIBERATIONS

Jurors for the Jon E. Yount trial reached their verdict rather quickly.

The Courier-Express learned that in the early stages of the deliberation, four of the jurors were holding out for the supreme penalty; and another was urging the legal insanity verdict.

It was during this instance during deliberations that the jurors sought the list of possible verdicts. This was refused because it is not court procedure to provide a written list of verdicts. The jurors had wanted the list to better acquaint themselves and to visually see the list of possible verdicts.

A number of exhibits were displayed in the jury room for use by the jury if it so desired, but the Courier-Express learned that

See MORE DETAILS, Page 2

More Details

only a few items were handled. These items included the death certificate, as issued by the county coroner; and the undergarments of the victim and the defendant. The jurors had requested and received photographs of both, but these were returned to the court after they had been examined.

EXHIBIT P-1-t

[Y]OUNT FILES MOTION FOR NEW TRIAL
THE COURIER-EXPRESS

No. 239 Serving Clearfield, Elk and Jefferson Counties
DuBois, PA., 15801, Tuesday, October 11, 1966

Dial 371-4200 16 Pages

CHARGES JUDGE'S ERRORS

CLEARFIELD, Pa (AP)—Jon E. Yount, convicted of first degree murder and rape and sentenced to life imprisonment, has asked for a new trial and an arrest of judgment.

Motions were filed Monday in Clearfield County Court by Yount's attorney, Homer W. King of Pittsburgh.

Yount, 28, a former DuBois Area High School teacher, was convicted Friday in the death of a pupil, Pamela Sue Rimer, 18, of Luthersburg R.D. 3.

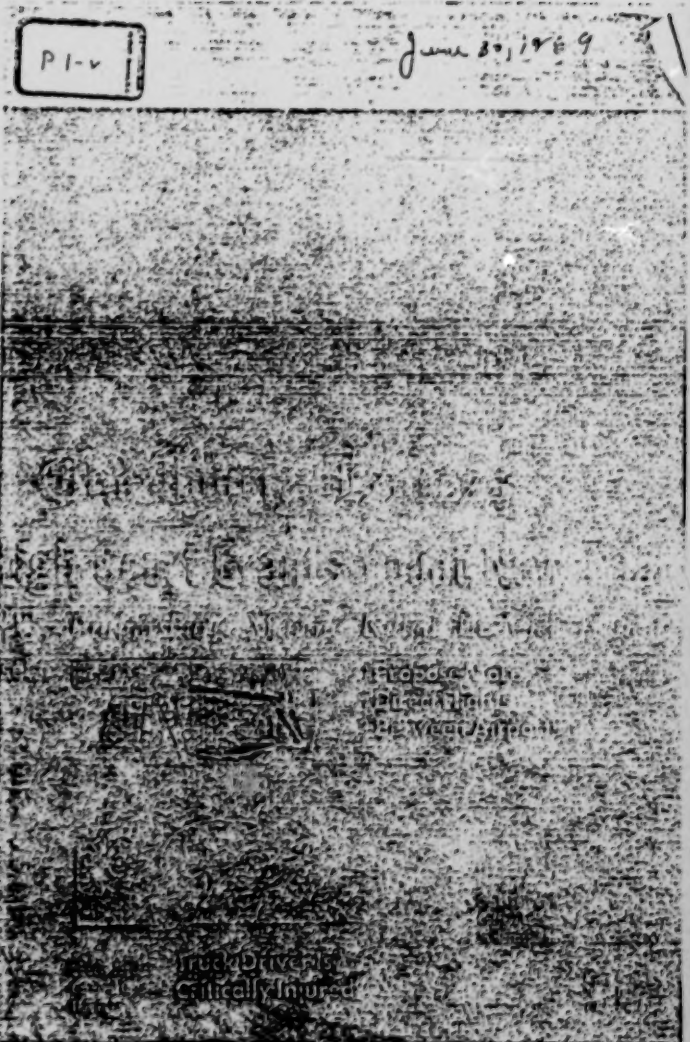
The motion for a new trial was based mainly on alleged errors by Judge John A. Cherry.

The defense said the judge erred in his instructions to the jury; improperly allowed certain Commonwealth exhibits into evidence; improperly allowed the jury to view certain exhibits during deliberation; refused to grant the defendant's motion to withdraw the jury when certain motions were made during trial; allowed into evidence the defendant's statements and confessions which the defense claims were given involuntary and without benefit of counsel.

Yount also reserved the right to file additional reasons for a new trial and arrest of judgment after the testimony has been transcribed. The transcription is expected to take several months.

642a

Exhibit P-1-v



Best Copy Available

EXHIBIT P-1-w

July 1 '69

JUDGE CHERRY AWAITS COPIES OF YOUNT
DECISION

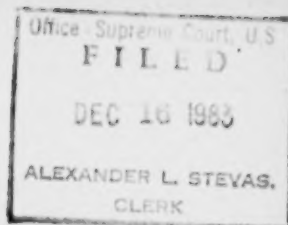
Clearfield County Judge John Cherry is awaiting copies of the State Supreme Court decision which orders a new trial for Jon E. Yount, a DuBois Area High School teacher now serving life imprisonment for first degree murder and rape of a pupil, 18 year old Pamela Sue Rimer of Luthersburg, R. D. 1.

The State Supreme Court's decision was handed down last Friday by Justice Samuel J. Roberts.

Reversing the decision of Judge Cherry, who turned down an appeal for a new trial, the State Supreme Court based its finding on the Miranda case that Yount failed to receive all of the warnings of his right to counsel. The Commonwealth concluded Yount was not told of his right to free counsel, if he could not afford his own attorney.

The supreme court's decision reversed the county court's conviction and sentence and ordered a new trial.

Yount surrendered at the state police station at DuBois April 29, 1966, the morning following the murder.



VOLUME III—Pages 645a-917a

No. 83-95

In the Supreme Court of the United States

October Term, 1983

**ERNEST S. PATTON, Superintendent, SCI—CAMP HILL,
and HARVEY BARTLE, III, Attorney General of the Com-
monwealth of Pennsylvania,**

Petitioners,

v.

JON E. YOUNT,

Respondent.

**On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit**

JOINT APPENDIX

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**Petition for Certiorari Filed June 29, 1983.
Certiorari Granted October 17, 1983.**

TABLE OF CONTENTS

	PAGE
VOLUME I:	
Docket Entries—United States District Court for the Middle District of Pennsylvania	1a
Docket Entries—United States District Court for the Western District of Pennsylvania	3a
Docket Entries—United States Court of Appeals for the Third Circuit	12a
PROCEEDINGS IN THE COURTS OF PENNSYLVANIA:	
Transcript of Hearing:	
Vera K. Krapf:	
Voir Dire Examination	18a
Blair Hoover:	
Voir Dire Examination	29a
Clair Clapsaddle:	
Voir Dire Examination	40a
John Yorke:	
Voir Dire Examination	53a
Mary Jane Waple:	
Voir Dire Examination	66a
James F. Hrin:	
Voir Dire Examination	80a
Martin R. Karetski:	
Voir Dire Examination	96a
Julia C. Hummel:	
Voir Dire Examination	116a

Omar H. Ives:	
Voir Dire Examination	136a
Mrs. Jessie M. Parks:	
Voir Dire Examination	146a
Albert I. Undercuffer:	
Voir Dire Examination	160a
Robert P. Murphy:	
Voir Dire Examination	173a
Irene Kurtz:	
Voir Dire Examination	189a
John T. Harchak:	
Voir Dire Examination	206a
David J. Chincharick:	
Voir Dire Examination	229a
LaVerne B. Pyott:	
Voir Dire Examination	245a
Memorandum and Order, Sept. 21, 1970	259a
Memorandum and Order, Nov. 14, 1970	262a
Opinion, County Court, Jan. 15, 1973	267a
Order	276a
VOLUME II:	
Opinion, Supreme Court of Pennsylvania, Jan. 24, 1974	277a
PROCEEDINGS IN THE FEDERAL COURTS:	
Motion To Proceed in Forma Pauperis	295a
Affidavit of Poverty	296a
Petition for Writ of Habeas Corpus	297a
Answer to Petition for Writ of Habeas Corpus ..	310a
Petitioner's Traverse to Respondents' Answer to Petition for Writ of Habeas Corpus	336a

Order, April 16, 1981	349a
Amendment to Petition for Writ of Habeas Corpus	350a
Answer to Amendment to Petition for Writ of Habeas Corpus	359a
Petition To Dismiss Petition for Writ of Habeas Corpus	393a
Transcript, Hearing, November 3, 1981, United States District Court, on Petition for Writ of Habeas Corpus:	395a
Petitioner's Evidence:	
Homer W. King, Esq.:	
Direct Examination	401a
Cross-Examination	434a
Redirect Examination	449a
Recross-Examination	452a
Caroline Yount:	
Direct Examination	454a
Cross-Examination	464a
Redirect Examination	469a
Constance Ives:	
Direct Examination	472a
Cross-Examination	475a
James V. Wade:	
Direct Examination	477a
Jon E. Yount:	
Direct Examination	482a
Cross-Examination	513a
Redirect Examination	514a

Petitioner's Exhibits:

P-1-a — Newspaper Article, April 29, 1966 ..	520a
P-1-b — Newspaper Article, April 30, 1966 ..	529a
P-1-d — Newspaper Article, May 3, 1966 ...	533a
P-1-f — Newspaper Article, September 19, 1966	542a
P-1-g — Newspaper Article, September 26, 1966	544a
P-1-h — Newspaper Article, September 27, 1966	552a
P-1-i — Newspaper Article, September 28, 1966	557a
P-1-j — Newspaper Article, September 29, 1966	565a
P-1-k — Newspaper Article, September 30, 1966	574a
P-1-l — Newspaper Article, October 1, 1966.	583a
P-1-m — Newspaper Article, October 3, 1966	591a
P-1-n — Newspaper Article, October 4, 1966	598a
P-1-o — Newspaper Article, October 5, 1966	607a
P-1-p — Newspaper Article, October 6, 1966	617a
P-1-q — Newspaper Article, October 7, 1966	623a
P-1-r — Newspaper Article, October 8, 1966	631a
P-1-s — Newspaper Article, October 10, 1966	639a
P-1-t — Newspaper Article, October 11, 1966	640a
P-1-v — Newspaper Article, June 30, 1969 ..	642a
P-1-w — Newspaper Article, July 1, 1969 ...	643a
P-1-x — Newspaper Article, July 5, 1969	644a

VOLUME III:

P-1-y—Newspaper Article, July 10, 1969 . . .	645a
P-1-z—Newspaper Article, Sept. 8, 1969 . . .	646a
P-1-aa—Newspaper Article, Oct. 27, 1969 . .	648a
P-1-bb—Newspaper Article, Dec. 6, 1969 . .	649a
P-1-cc—Newspaper Article, Feb. 25, 1970 . .	650a
P-1-dd—Newspaper Article, March 9, 1970 . .	651a
P-1-ee—Newspaper Article, May 7, 1970 . . .	652a
P-1-ff—Newspaper Article, May 15, 1970 . .	653a
P-1-gg—Newspaper Article, Sept. 22, 1970 . .	654a
P-1-hh—Newspaper Article, Sept. 30, 1970 . .	655a
P-1-ii—Newspaper Article, Oct. 7, 1970 . . .	655a
P-1-jj—Newspaper Article, Oct. 27, 1970 . .	656a
P-1-kk—Newspaper Article, Nov. 3, 1970 . .	657a
P-1-ll—Newspaper Article, Nov. 4, 1970 . . .	658a
P-1-mm—Newspaper Article, Nov. 5, 1970 . .	658a
P-1-nn—Newspaper Article, Nov. 6, 1970 . .	661a
P-1-oo—Newspaper Article, Nov., 1970	662a
P-1-pp—Newspaper Article, Nov., 1970 . . .	663a
P-1-qq—Newspaper Article, Nov. 10, 1970 . .	664a
P-1-rr—Newspaper Article, Nov. 12, 1970 . .	666a
P-1-ss—Newspaper Article, Nov. 13, 1970 . .	667a
P-1-tt—Newspaper Article, Nov. 14, 1970 . .	667a
P-1-uu—Newspaper Article, Nov. 16, 1970 . .	669a
P-1-vv—Newspaper Article, Nov. 17, 1970 . .	670a
P-1-ww—Newspaper Article, Nov. 18, 1970 . .	672a
P-1-xx—Newspaper Article, Nov. 19, 1970 . .	673a
P-1-yy—Newspaper Article, Nov. 20, 1970 . .	674a
P-1-zz—Newspaper Article, Nov., 1970	677a

P-1-aaa — Newspaper Article, Nov. 23, 1970	678a
P-1-bbb — Newspaper Article, Dec. 1, 1970	679a
P-1-ccc — Newspaper Article, Oct. 6, 1981	681a
P-1-ddd — Newspaper Article, Oct. 10, 1981	682a
P-1-eee — Newspaper Article	683a
P-1-fff — Newspaper Article	685a
P-1-ggg — Newspaper Article	685a
Plaintiff's Exhibit No. 5 — Newspaper Article, Oct. 6 and 10, 1981	687a
Transcript, Hearing, December 28, 1981, United District Court, Before Robert Mitchell, United States Magistrate:	689a
Respondent's Evidence:	
Hon. John A. Cherry:	
Direct Examination	690a
Cross-Examination	700a
Redirect Examination	710a
Recross-Examination	710a
Hon. John K. Reilly, Jr.:	
Direct Examination	712a
Cross-Examination	719a
Francis V. Sebino, Esq.:	
Direct Examination	722a
Cross-Examination	734a
Redirect Examination	738a
Recross-Examination	739a
Magistrate's Report and Recommendation	744a
Order, February 12, 1982	769a
Respondent's Objections to Magistrate's Report and Recommendation	770a

Amendment to Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus	778a
Order, March 31, 1983	781a
Opinion, United States District Court, April 22, 1982	783a
Order, United States District Court, April 22, 1982	809a
Order, April 23, 1982	810a
Motion To Supplement the Record	811a
Order, May 21, 1982	828a
Answer to Motion To Supplement the Record ..	829a
Order, June 21, 1982	831a
Notice of Appeal	832a
Opinion, United States Court of Appeals for the Third Circuit	833a
Judgment, United States Court of Appeals for the Third Circuit	892a
Petition for Writ of Certiorari	894a
Respondent's Brief in Opposition	906a
Order Allowing Certiorari	917a

EXHIBIT P-1-y

July 10, 1969

THE COURIER-EXPR[ESS]

Clearfield, Elk and Jefferson Counties DuBois, PA.,
15801, Thursday, July 10, 1969

YOUNT RULING BRINGS PROPOSED LEGISLA-
TION

HARRISBURG (AP) — A Republican sponsored bill was introduced in the House Wednesday aimed at discouraging courts from refusing the admission of voluntary confessions because of legal technicalities.

Heading the list of co-sponsors was Minority Leader Lee A. Donaldson Jr., R-Allegheny, who said the bill was patterned after the 19... Federal Omnibus Crime Control and Safe Streets Act.

Donaldson cited a recent State Supreme Court decision which ordered a retrial for a high school teacher convicted of the rape-murder of a student.

The court ruled that the teacher's confession had been admitted as evidence wrongfully because he had not been advised of his right to free counsel, if he was unable to afford a lawyer.

Donaldson said his bill would require that a suspect be apprised of his constitutional rights, but that a court would not necessarily have to throw out a confession because of a slip-up.

"Where the confession is voluntary, the court may properly rule it admissible rather than mechanically reject it for want of technical compliance with a ...

EXHIBIT P-1-z

Sept. 8, 1969DA REILLY TRYING TO STOP RETRIAL OF
SLAYER YOUNT

Clearfield County District Attorney John K. Reilly Jr. says he has not given up the fight to stop the retrial of Jon E. Yount, convicted slayer of 18-year-old Pamela Sue Rimer of Luthersburg, RD.

Mr. Reilly was contacted after being notified that the Pennsylvania Supreme Court has turned down his petition to reargue a motion for a new trial before the court.

"We are of course very disappointed in the Supreme Court decision but we are now looking into other possible steps that can be taken" Mr. Reilly said.

When asked to elaborate on the statement, the district attorney explained he is now investigating the possibility of taking the case before the United States Supreme Court either through an appeal or an order of certiorari which would place the records of the case before the highest court for review.

This he indicated would be the last legal means of stopping the retrial of the former DuBois Area High School teacher who is presently serving a life sentence after being found guilty of first degree murder and rape.

If this should also be denied then Yount will be brought back to the Clearfield County for a retrial on the charges.

The district attorney said the new trial would probably be held at the first criminal court term following the U.S. Supreme Court decision.

The Pennsylvania Supreme Court granted Yount a new trial on a 4-1 decision on the basis that the former mathematics teacher had been denied his constitutional right as claimed by his attorney, Homer E. King of Pittsburgh...

technicality. In informing Yount of his rights at the time of his arrest the police and district attorney failed to tell him that he was entitled to a court-appointed free attorney if he could not afford to hire his own.

District Attorney Reilly admitted that no one had mentioned this because they were aware that the defendant was a high school teacher and apparently able to hire an attorney. However, defense attorney King argued there was no assurance a teacher's salary was sufficient to bear the costs of a long murder trial and the majority of the Pennsylvania Supreme Court justices agreed.

Mr. King was one of the two attorneys Mr. Yount hired to represent him. The other was David Blakely of DuBois.

Yount was convicted by a jury in 1966 of the murder and rape of Miss Rimer, one of his students in an accelerated math class. Reprint from Clearfield Progress.

P-1-bb

Dec 6, 69

Express

DECEMBER 6, 1969

DIME CITY - 42000

ANNE LANDERS
Answers Questions
Letters on Social Pages
regularly

20 PAGES

10 CENTS

ESCAPES

Tragedy rsburg Upsets

Escapes from the prison in the city of New York, the tragedy of the escapees has been a source of great concern to the public.

The escapees have been a source of great concern to the public.

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Specter Will Help D.A. Block Yount Retrieval

PHILADELPHIA (AP) — Sen. Frank Lautenberg (D-N.J.) will help the Delaware Attorney General block the retrieval of the body of a man who was killed in a car crash.

The man, who was killed in a car crash, was the son of a man who was killed in a car crash.

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Black Panther Leader Given Prison Terms

PHILADELPHIA (AP) — A Black Panther Party leader has been given a prison term.

The leader, who was given a prison term, was the son of a man who was killed in a car crash.

The leader, who was given a prison term, was the son of a man who was killed in a car crash.

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77 Per Cent Approve Nixon Vietnam Policy

PHILADELPHIA (AP) — A survey of public opinion shows that 77 per cent of the population approve of Nixon's Vietnam policy.

The survey, which was conducted by a group of experts, shows that 77 per cent of the population approve of Nixon's Vietnam policy.

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650a

Exhibit P-1-cc

EXHIBIT P-1-cc

Feb. 25, 1970

COURIER-EXPRESS

Counties DuBois, PA., 15801, Wednesday, February
25, 1970 Dial 371-4200

YOUNT GETTING NEW TRIAL

According to a news dispatch from Washington D. C. yesterday, it has been announced that the U.S. Supreme Court has refused to reverse a decision of the Pennsylvania Supreme Court which had ordered a new trial for Jon E. Yount, convicted of the murder and rape of 18-year-old Pamela Sue Rimer of Luthersburg, R.D. 1 in 1966.

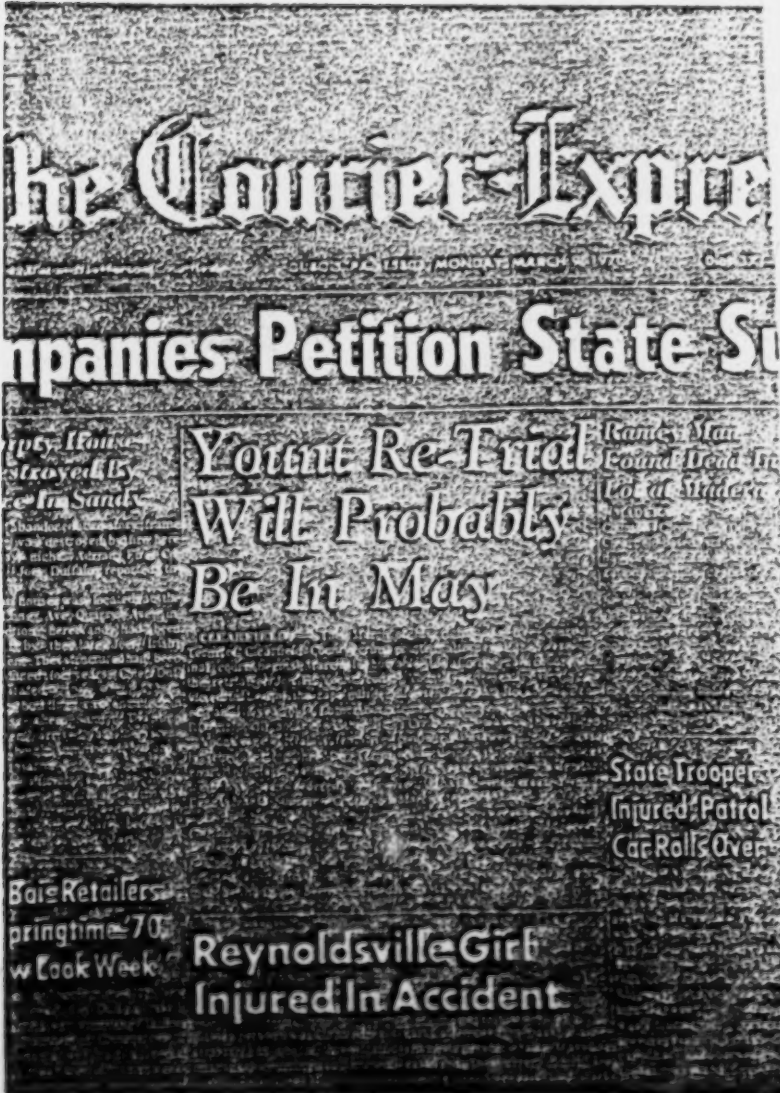
The State Supreme Court had ordered the new trial on the grounds that police had failed to advise Yount of his right to free counsel at the time of his arrest, voting 4-1 to grant the new trial on that technicality.

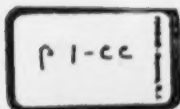
District Attorney John K. Reilly, Jr., of Clearfield County, when contacted, stated that his office had no information relative to the case but was endeavoring to secure it.

His office in connection with other legal authorities had filed a brief with the Supreme Court asking for a rehearing on the case.

P 1-dd

march 9, 1970





may 7, 1970

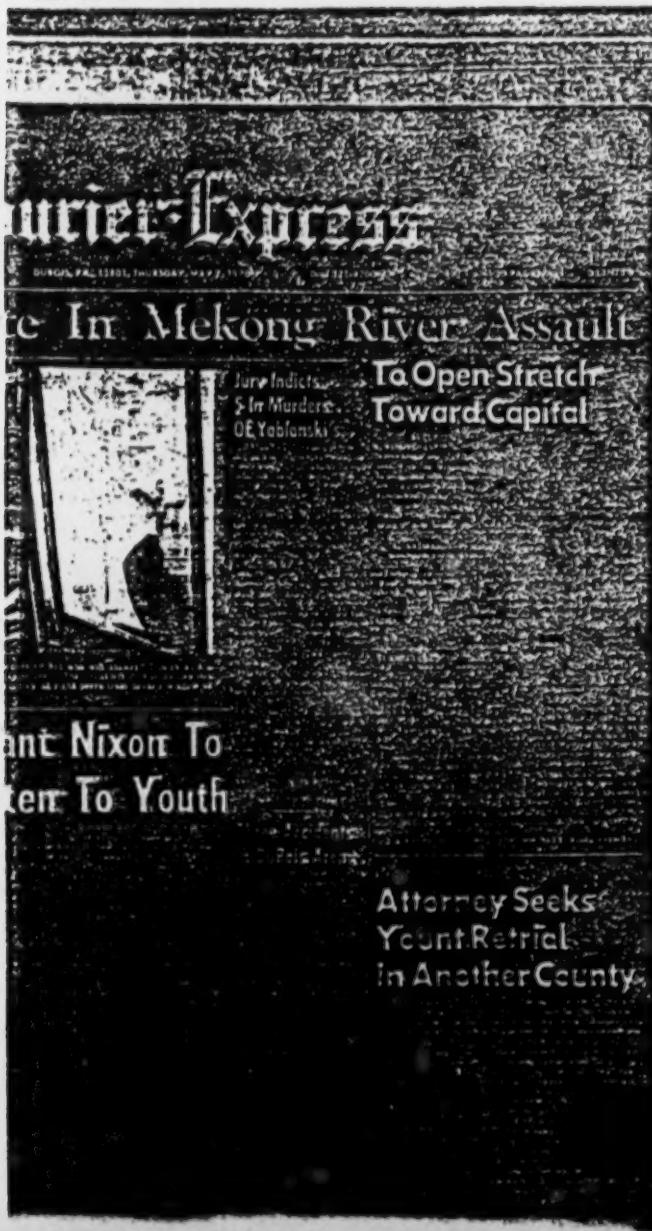


EXHIBIT P-1-ff

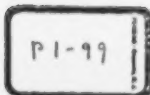
JUDGE GRANTS NEW DATE FOR YOUNT HEARING

Clearfield County President Judge John A. Cherry has granted a continuance in the hearing request on a change of venue and other matters relating to the re-trial of Jon E. Yount.

The hearing originally scheduled for May 15, was postponed until June 5th on the request of the defendant's counsel, seeking to have the re-trial moved to another county.

654a

Exhibit P-1-gg



Sept 22 1970

The Courier-Express

New Trial For Yount Will Be Held In Clearfield Co.

DUBOIS AREN SCHOOL DISTRICT Continuing Title I Program

Briefs Falls Creek Co On Leasing Of Water

Shortway Days Program Shopping Up As Best Ever




EXHIBIT P-1-hh

THE COURIER-EXPRESS[SS]

Serving Clearfield, Elk and Jefferson Counties,
DuBois, PA., 15801, Wednesday, Sept. 30, 1970

YOUNT RETRIAL SET NOVEMBER 2

CLEARFIELD—Nov. 2 has been set by Clearfield County Judge John A. Cherry for the retrial of Jon E. Yount, DuBois, convicted of first degree murder in the rape-slaying of 17-year-old Pamela Sue Rimer of Luthersburg RD, a high school...

EXHIBIT P-1-ii

Oct. 7, 1970

YOUNT TRIAL DATE CHANGED TO NOV. 4

According to an announcement from the Clearfield County Court, the date of the beginning day of the Jon Yount trial originally scheduled for Monday, Nov. 2nd has been postponed until Wed., Nov. 4th.

All jurors and others involved have been notified to appear at 8:30 a.m. on Nov. 4th.

The move was made to permit those concerned with the trial to vote on Tues., Nov. 3rd at the General Elections.

P-1-11

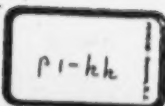
1970



7

OCT

27



NOV 31 1970

Be Sure To Cast Your Vote

Courier-Express

sting Election Ballots Today

Pennsylvania

Adopt Realistic Plans for

Falls Creek Boro To Improve Water Service

Young Retriever
Begins Wednesday
At Clearfield

One Of 5 Adults Have Breakdowns

Nationwide

Original Amateur Hour
At End Of Long Road

EXHIBIT P-1-ll

Nov. 4, 1970

YOUNT PLEADS NOT GUILTY, SELECTING
JURORS

CLEARFIELD—Jon E. Yount, 32 of DuBois, RD, pled not guilty to the charges of the wilful murder of Pamela Sue Rimer, Luthersburg, on April 28, 1966, as the indictment was read in Clearfield County Court this morning, Judge John A. Cherry presiding.

Upon taking roll call of the jurors called for duty, it was discovered that three were absent. The judge issued bench warrants mandating their appearances. One was from Rockton, one from Fallen Timber and one from Coalport.

At presstime today, five jurors had been questioned, none seated. They were asked if they had formed an opinion in the case as the result of conversa-...

EXHIBIT P-1-mmNov. 5, 1970

... p.m. and receiving instructions from Clearfield County Judge John A. Cherry, Mr. Hoover was led to the jury room where he remained for the rest of the day, eating his lunch there—alone.

He was led to his quarters when court was recessed at 5:10 p.m. until 9 a.m. today to be ... room, one by one, after their name was called by the chief clerk after drawing the name from a box was Yount's chief attorney, Homer King of Pittsburgh.

-0-

BEFORE THE selection of jurors began, Judge Cherry deliver-

See SELECTING, Page 2

PROFILE OF DEFENDANT

By SHELLY SMOYER

Staff Writer

CLEARFIELD—He smiles, chuckles, and listens intently while his chief counselor, Homer King of Pittsburgh, questions prospective jurors.

Jon E. Yount, formerly of DuBois, RD, now 32, sits beside his attorneys, a youthful looking man, clad in a dark fashionable suit, wearing a light blue shirt and dark tie.

His hair is cut in a conservative mod style, and he has earlobe length sideburns. He talks to his guards and court officials with whom he is acquainted—but briefly.

Yount, a former mathematics teacher at DuBois Area Senior High School, is on trial for the murder of 18-year-old Pamela Sue Rimer of Luthersburg RD 1, one of his students, on April 28, 1966.

He has lost weight since that time and is now trim with a fine physique. He wears fashionable dark-

rimmed glasses with heavy lenses. Occasionally he takes them off and nibbles on an arm while listening to answers given by prospective jurors.

Yount wears a silver wedding band on the third finger of his right hand. At the time of his arrest in connection with the death of Miss Rimer, Yount was married and the father of two children.

— 0 —

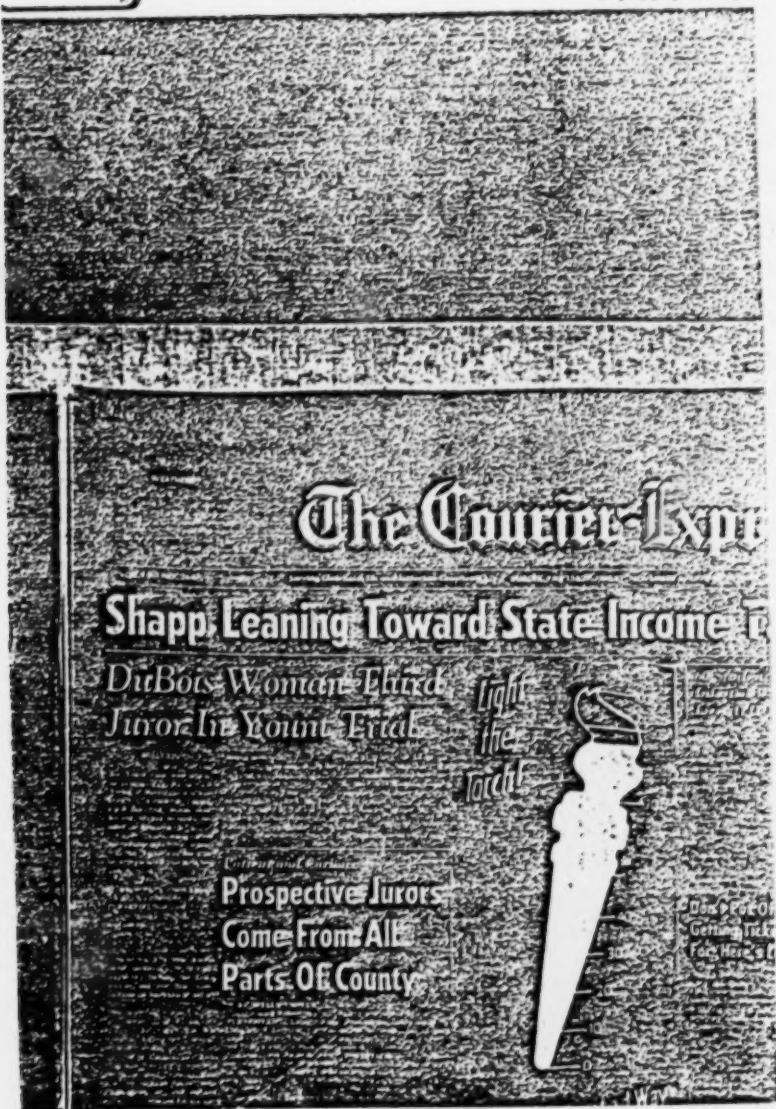
YOUNT WAS brought to Clearfield County Jail Oct. 13 from Rockview State Prison to stand trial. He is now confined to the county jail here.

Just a few spectators were on hand for the opening of the trial in the No. 1 Court Room here Wednesday.

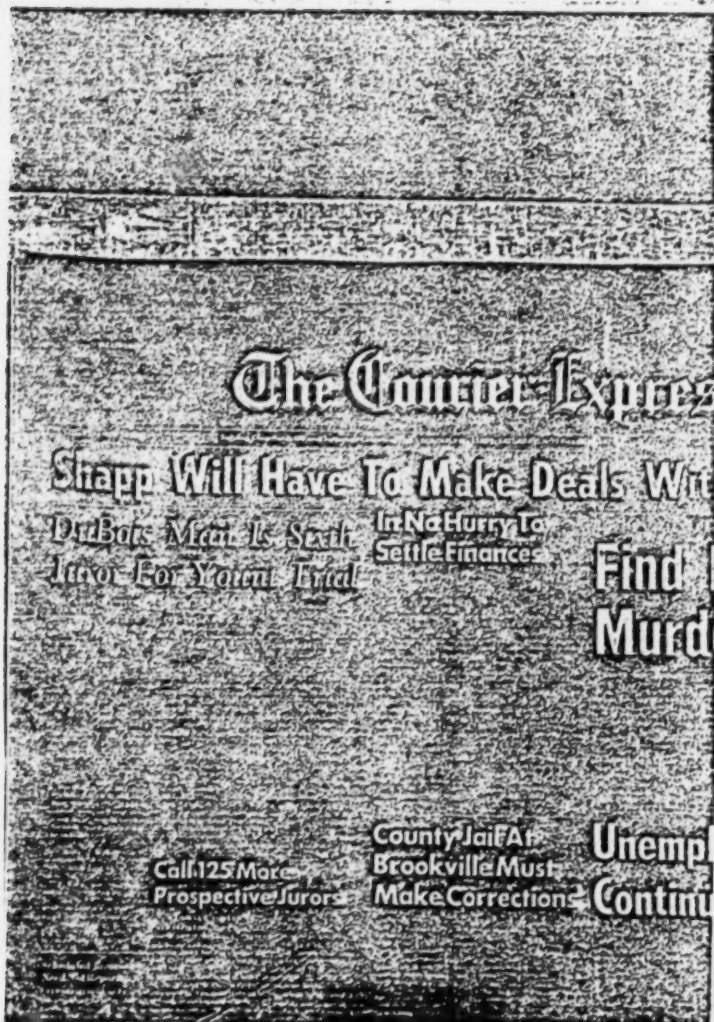
After the reading of the indictment by the chief court clerk charging him with the willful murder of Miss Rimer on April 28, 1966, Yount answered "Not Guilty" in a firm voice. He was backed by his

See PROFILE, Page 2

P1-nn



P-1-00



P 1-pp

The Courier-Express

DuBois Man Becomes 7th Juror For Yount Trial

**Philipsburg Girl
Miss Teenage
Northwestern
Pennsylvania**

**Identified
As Esc**

**Apollo 14 To
Launch Pack**

**Supreme Court
Refuses Writ
Legalize Suits**



**Student Charged
With Slaying
Clearfield Girl**

**Soviet Space
Program Making
Strong Recovery**

**Patty Faust Of
Brockway Picked
First Runner-Up**

**State Police
Investigate
Accident**

EXHIBIT P-1-qq

Nov. 10, 1970

DISMISS SECOND GROUP
QUESTIONING OF 35 PROSPECTIVE JURORS
UNDERWAY

CLEARFIELD—Selection of a jury to hear the Jon E. Yount case continued today with no additional jurors picked at presstime.

Questioning of 35 jurors whose names were drawn as prescribed by law began at 10 a.m. this morning.

The names were drawn from the jury wheel Monday night, and those selected, were notified by the sheriff's office here.

Monday morning 125 jurors summoned by the sheriff's office over the weekend were on hand for call.

However, Yount's chief defense counsel, Homer W. King of Pittsburgh, objected to the manner in which they were picked.

While the prospective jurors were crowded into offices and a hallway at the rear of the courtroom here, legal arguments proceeded.

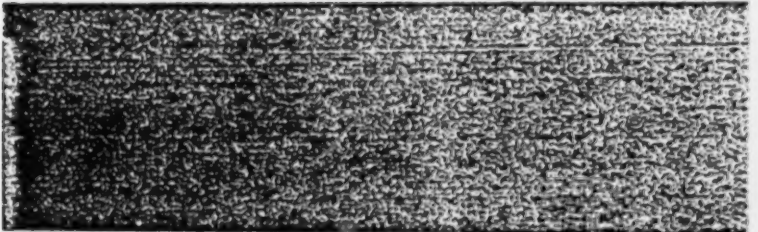
Deputy sheriffs and constables were summoned and questioned as to the manner in which the additional jurors were selected.

Following a lengthy consultation of counsels with Judge John A. Cherry after the questioning of deputies and constables, Judge Cherry sustained King's objection.

The prospective jurors were dismissed and reimbursed for their trouble. Selection of additional jurors via the jury ... more are needed—five regular and one alternate.

After a jury is chosen, Yount, formerly of DuBois, RD, will be tried on a charge of murder in connection with the death of Pamela Sue Rimer, 18 of Luthersburg RD 1, whose body was found near her Brady Twp. home April 28, 1966.

p 1-rr



No Joy In Clucktown... Beaver Triumph In

The Courier-Express

10 Jurors Have
Been Seated In
Yount Trial

Believe Dead
Man Is One Of
Who Escaped

Veterans Must Cont
Heart And Strength

France Says
Goodby To
De Gaulle

Brooklyn Area
School Board
Hears Report

EXHIBIT P-1-ss

THE COURIER-EXP[RESS]

Serving Clearfield, Elk and Jefferson Counties DuBois,
PA., 15801, Friday, November 13, 197[0]

YOUNT JURY NEARLY COMPLETE, NEED 2
ALTERNATES

CLEARFIELD—The Jon E. Yount murder trial
could conceivably begin Saturday.

Selection of two alternate jurors was under way
today after the final two regular jurors were seated
Thursday, one of whom is from DuBois.

Juror No. 11 is Robert P. Murphy, 514 W.
Washington Ave., DuBois, business manager at the
DuBois Campus of Pennsylvania State University. He
is married and the father of a daughter, a senior at
DuBois Area Senior ...

EXHIBIT P-1-tt

THE COURIER-EXPR[ESS]

Clearfield, Elk and Jefferson Counties DuBois, PA.,
15801, Saturday, Nov. 14, 1970

DEATH IN FAMILY EXCUSES WOMAN FROM
YOUNT JURY

CLEARFIELD—Selection of the Jon E. Yount
murder trial jury ground to a halt late Friday morning

when a juror already chosen was excused because of a death in her family.

Mrs. Katherine Spehalski, DuBois, Juror No. 3, chosen Friday, Nov. 6, was excused by the court because of the death of her younger sister, Mrs. Josephine Brunswick, DuBois, who died Friday.

During the selection of jurors Friday morning, the list of prospective jurors was exhausted. Chief Defense Counsel Homer E. King of Pittsburgh then petitioned for a change of venue (change of county), saying a jury could not be seated in Clearfield County.

The afternoon session was taken up by legal argument on the petition and a legal question of additional preemptory challenges because of the excusing of Mrs. Spehalski.

The defense has used up all the preemptory challenges. Late Friday afternoon, the petition for change of venue was denied and an order given for the drawing of additional prospective jurors.

The sheriff's office late this morning was rounding up 13 prospective jurors chosen via the jury wheel and the court was awaiting their arrival to continue questioning of jurors.

With the excusing of Mrs. Spehalski, a widow, a replacement and two alternates are needed...

EXHIBIT P-1-uu

[TH]E COURIER-EXPRESS

[Cle]arfield, Elk and Jefferson Counties DuBois, PA.,
15801, Monday, Nov. 16, 1970

SELECTION OF YOUNT JURY ENTERS 11TH DAY

CLEARFIELD—Selection of a jury for the Jon E. Yount murder trial entered its 11th day with one juror and two alternates still needed.

Fifteen additional jurors were summoned Saturday when the list of those drawn last week were exhausted. They began arriving Saturday afternoon but none were chosen.

Court resumed this morning with questioning of those prospective jurors drawn Saturday.

Selection of a jury to hear testimony in the case was complicated Friday afternoon when Juror No. 3, Mrs. Katherine Spehalski of DuBois, was excused because of the unexpected death of her youngest sister.

Also, on Friday, the defense counsel petitioned for a change of venue which was denied by the court Saturday. Following the ruling the court ordered 15 more prospective jurors drawn from the jury wheel.

Yount, formerly of DuBois, is charged with murder in the April 28, 1966 death of Pamel Sue Rimer, 18, Luthersburg RD...

EXHIBIT P-1-vv

[THE COURIER]-EXPRESS

15801, Tuesday, Nov. 17, 1970 Dial 371-4200 12 Pages
10 Cents

JURY OF 8 MEN AND 4 WOMEN
YOUNT TRIAL BEGINS

CLEARFIELD—A jury of eight men and four women began hearing testimony in the Yount murder trial when Clearfield County Criminal Court convened at 9 this morning.

After 11 days, the jury and two alternates to hear the case was selected. The final alternate juror was selected at 3:30 p.m. Monday.

The regular jury consists of Blair Hoover, Morrisdale RD; Clair Clapsaddle, Grampian RD; John T. Harchak, Morann, John Yorke, Houtzdale; Mrs. Mary Jane Waple, Bigler; James F. Hrin, DuBois; Martin R. Karetski, DuBois; Mrs. Julia Hummel, Clearfield; Mrs. Jessie Parks, Clearfield; Albert I. Undercoffer, Clearfield; Robert P. Murphy, DuBois, and Mrs. Irene Kurtz, Mahaffey.

The alternates are David J. Chincharick, Ginter and Mrs. Laverne B. Trott, Burnside. Mrs. Trott was the final juror to be chosen.

Mr. Harchak replaces Mrs. Katherine Spehalski, DuBois, Juror No. 3 who was excused from jury duty Friday because of the death of her youngest sister.

Jon E. Yount, 32, is charged with murder in the death of Pamela Sue Rimer, 18, Luthersburg RD 1,

April 28, 1966. He is being represented by Homer W. King and Francis Sabino, Pittsburgh and David E. Blakely, DuBois.

The Commonwealth is being represented by Clearfield County District Attorney John K. Reilly and Assistant DA Ervin Fennell of DuBois.

The regular jury panel and the two alternates will be shut off from the outside world until the trial is completed. If for some reason a regular juror cannot continue to serve, an alternate will take his or her place in the jury box.

Otherwise, the two alternates will be dismissed at the time the case is turned over to the jury for a verdict.

After opening remarks, the Commonwealth will begin presenting its case. Chief prosecution witness is State Police Trooper Donald E. Bedford of the DuBois State Police substation.

P-1-ww

er-Express

MON, P.M. 11:30 P.M. WEDNESDAY, NOV. 18, 1970

Dist. 317-4100

18 PAGES

Pamela Sue's Mother, Father & Close Friend Give Testimony

By NIELLY NIOVER
 KEARFIELD — Pamela Sue, 17, was the only child of the late Mr. and Mrs. R. L. Kinnick, who died in a fire at their home on Nov. 10. Kinnick, 42, was a member of the local chapter of the United Brotherhood of Carpenters and Joiners of America, No. 1000.

Testimony heard today by the jury in the case of the death of Pamela Sue Kinnick, 17, was given by her mother, Mrs. R. L. Kinnick, 42, who died in a fire at their home on Nov. 10. Kinnick, 42, was a member of the local chapter of the United Brotherhood of Carpenters and Joiners of America, No. 1000.

Testimony heard today by the jury in the case of the death of Pamela Sue Kinnick, 17, was given by her mother, Mrs. R. L. Kinnick, 42, who died in a fire at their home on Nov. 10. Kinnick, 42, was a member of the local chapter of the United Brotherhood of Carpenters and Joiners of America, No. 1000.

Inter-faith Thanks Victim's Eve Service



Interfaith and church groups today gathered to honor the memory of Pamela Sue Kinnick, 17, who died in a fire at her home on Nov. 10. The service was held at the local chapter of the United Brotherhood of Carpenters and Joiners of America, No. 1000.

Also called to the stand today were Pamela's mother, Mrs. R. L. Kinnick, 42, who died in a fire at their home on Nov. 10. Kinnick, 42, was a member of the local chapter of the United Brotherhood of Carpenters and Joiners of America, No. 1000.

The jury heard testimony today from Pamela's mother, Mrs. R. L. Kinnick, 42, who died in a fire at their home on Nov. 10. Kinnick, 42, was a member of the local chapter of the United Brotherhood of Carpenters and Joiners of America, No. 1000.

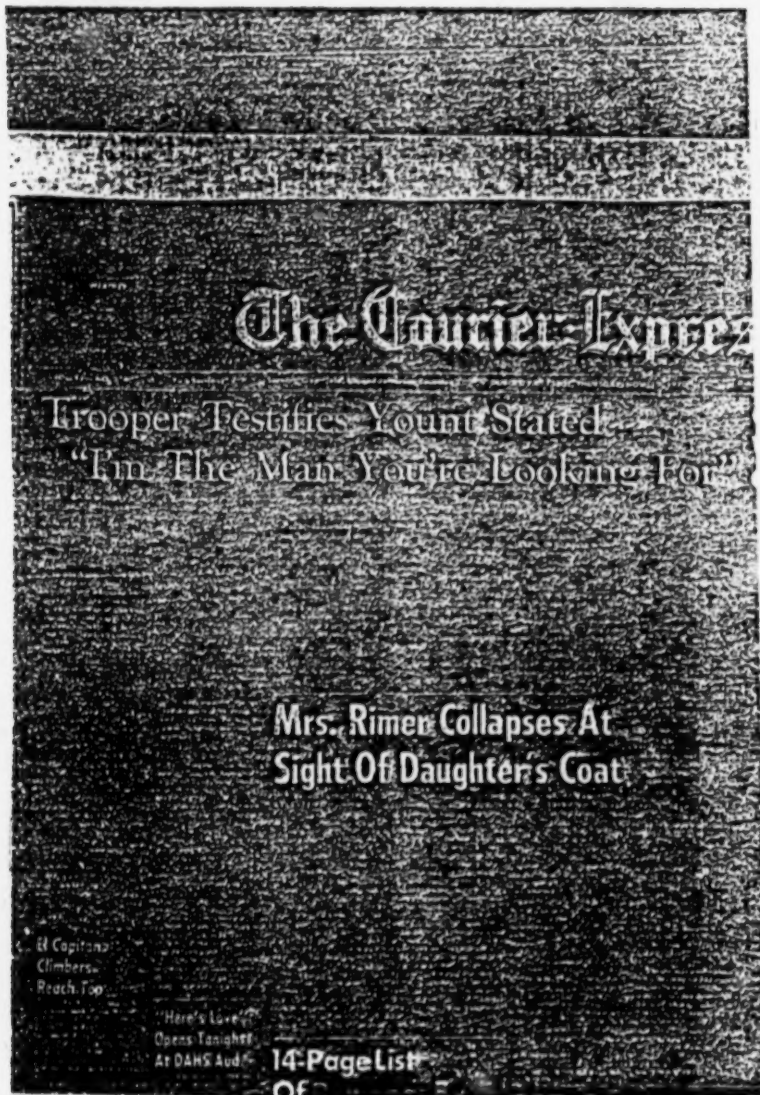
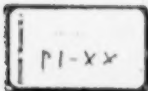


EXHIBIT P-1-yy

Nov. 20, 1970

... Yount murder case, this afternoon after hearing over two and a half days of testimony.

The jury was locked up in the jury room of the courthouse here after hearing closing remarks by Chief Defense Counsel Homer W. King of Pittsburgh and District Attorney John K. Reilly for the Commonwealth, and explicit instructions from Judge John A. Cherry.

All testimony was concluded at 3:43 p.m. Thursday. The state rested its case at 1:55 p.m. Following a 15 minute recess the defense gave its opening remarks.

At 3:43 p.m. the defense rested its case. This was after 16 reputation witnesses had appeared and stated Yount, formerly of DuBois, RD 2, had a "very good" reputation prior to April 28, 1966.

Judge Cherry recessed court at 3:43 p.m. until 8:30 a.m. today ... jury entered the jury room.

In his opening remarks Mr. King reminded the jury that they must hear all evidence and take all evidence into consideration when considering the case. He reminded the jurors of the opening instructions of the judge ...

This, Attorney King explained, is a man's reputation, how he is known to his family, friends, and associates in his community, and his character.

He urged the jury to hear and weigh all the evidence.

Then he began calling 16 repu...

DEFENSE TAKES ONLY ... HOUR TO PRESENT
... 16 REPUTATION WITN[ESSES] ...

By SHELLY SMOYER

CLEARFIELD—The Commonwealth ended its case against Jon E. Yount, 32, formerly of DuBois, RD 2, charged with murder in the April 28, 1966 death of Pamela Sue Rimer, 18, Luthersburg, RD, early Thursday afternoon by putting Yount's station wagon at the scene of the crime.

Thursday's testimony stated Yount was the owner of a blue-green 1961 Rambler station wagon seen in the vicinity of the Rimer home in the late afternoon of April 28, 1966.

The state produced physical evidence linking the vehicle to the crime and offered testimony that it was at the scene of the crime.

—0—

STATE POLICE Trooper Bernard Gorman, stationed at Punxsutawney at the time in question, corroborated State Police Detective Edward Kerr's statements about returning to the DuBois substation the night of April 28 from the scene.

Then Trooper Gorman testified he returned to the DuBois substation at 6 a.m. April 29, while being on assignment to check out the vehicle being sought in connection with the crime.

There he was assigned by Detective Kerr to get a search warrant for the vehicle, he stated. He obtained the warrant and located the vehicle in question at the home of the defendant's parents in DuBois, R.D. 2, the policeman testified.

He stated the vehicle was searched by Criminal ... that a school teacher by the name of Jon Yount owned a vehicle of the type being sought.

State Police Corporal John W. Magus was recalled and stated he made plaster of paris casts of a tire print in a ditch bordering the red dog road near the Rimer Home where tire tracks went into the clover and alfalfa field.

A wheel with a common snow tread on it, purported to be the rear wheel of the vehicle in question along with the casts were identified by Corporal Magus.

He stated the tread pattern of the tire and in the casts were similar. Also introduced was a portion of a sapling on which appeared apparent blood stains. This sapling was slightly above where the body was found.

Corporal Magus explained he took soil samples from the red dog road, then identified a sneaker found under the body when it was rolled over for photographs.

Under cross-examination, Corporal Magus testified he couldn't find any finger prints of the deceased in the station wagon ...

P 1-22



EXHIBIT P-1-aaa

Nov. 23, 1970

YOUNT SENTENCING SLATED NOV. 30

CLEARFIELD—Jon E. Yount, 32, formerly of DuBois RD 2, convicted of murder in the first degree in a re-trial concluded Friday, will be formally sentenced by Judge John A. Cherry at 9 a.m. Monday, Nov. 30.

After finding Yount guilty of murder in the first degree, the jury of eight men and four women recommended life imprisonment, ending Yount's second bid for freedom.

Following the verdict, Yount was returned to the Clearfield County Jail to await formal sentencing. Sentencing was delayed to permit Yount's counsel to decide whether to appeal the verdict.

[Y]ount was charged with murder in the April 28, 1966 death of 18-year-old Pamela Sue Rimer of Luthersburg RD 1.

P1-bbb-1

Dec 1 1970

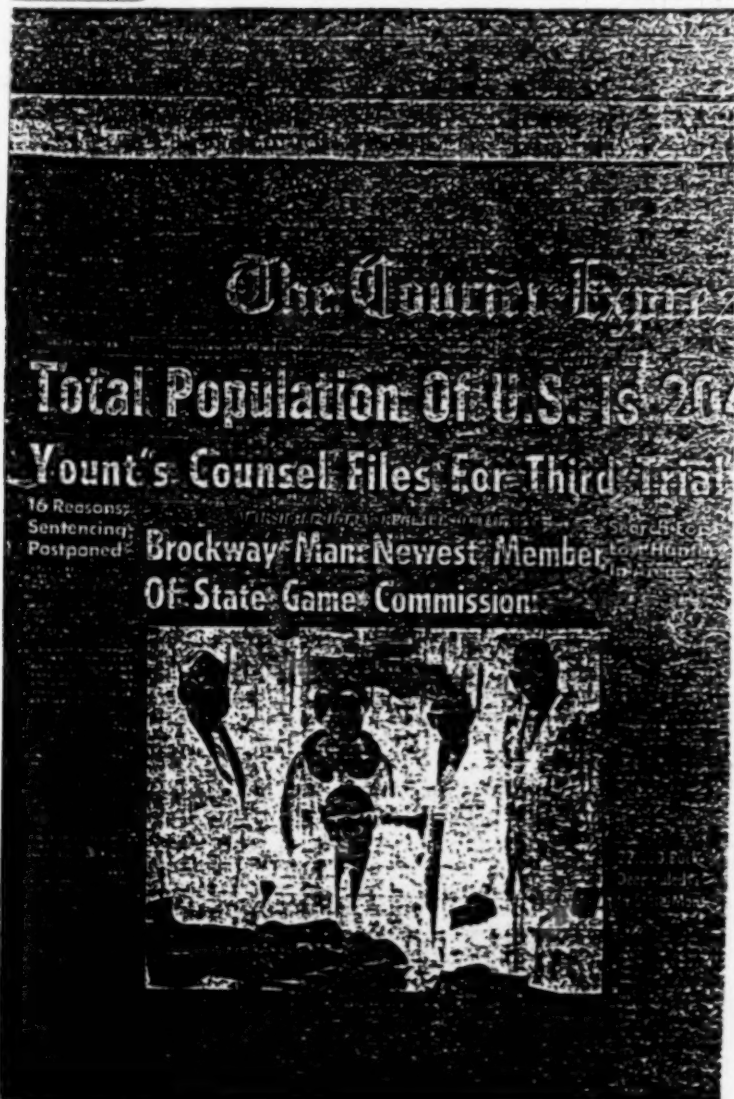


EXHIBIT P-1-bbb-2

Dec. 1, 1970

YOUNT'S COUNSEL[L] ...

16 REASONS, SENTENCING POSTPONED

CLEARFIELD—Attorney Homer W. King of Pittsburgh, chief defense counsel for Jon E. Yount, 32, formerly of DuBois, RD 2, twice convicted of the murder of 18-year-old Pamela Sue Rimer, Luthersburg, RD 1, has petitioned Clearfield County Court for a third trial.

The latest legal maneuver by Yount's attorney last Friday postponed the scheduled formal sentencing of Yount indefinitely until the court decides the matter of another new trial.

Yount was to have been sentenced Monday morning by Clearfield County Judge John A. Cherry after he was found guilty of first degree murder by a jury following a re-trial in November. The jury fixed the penalty at life imprisonment.

Instead, he was ordered returned to Rockview Penitentiary at once. Yount has been held in the Clearfield County Jail here since mid-October.

In his motion for a new trial, Attorney King cited 16 reasons. He also petitioned the court to grant him the right to state specific grounds in support of the motion after the record of the trial has been transcribed.

Thirteen of his points in support of the new trial were leveled against the conduct of the court during

the trial. The other three claimed the verdict "was against the evidence", "against the weight of the evidence" and "against the law."

King charged Judge Cherry with erring in failing to grant a change of venue. He also cited the judge's actions and remarks during the selection of jury and the trial itself.

King said the court should have suppressed such evidence as that pertaining to the defendant's ...

EXHIBIT P-1-ccc

10/6/81 *DuBois Courier-Express* Page 2

YOUNT CHALLENGING STATE CONVICTION IN
FEDERAL COURT

CLEARFIELD—Jon Yount, former DuBois resident and twice-convicted murderer of high school student Pamela Sue Rimer of Luthersburg, has filed a petition for habeas corpus, County District Attorney Thomas F. Morgan has announced.

Yount is challenging his state conviction in federal court, Mr. Morgan said. A hearing on the petition will take place Nov. 3 in Pittsburgh. The district attorney's office will be represented at the hearing.

The state pardons board is still considering Yount's annual automatic petition for parole for life. A hearing before the board took place in June.

The board has not yet handed down a decision.

EXHIBIT P-1-ddd

10/10/81 DuBois Courier-Express Page 1

WILL OPPOSE YOUNT PETITION AT NOV. 3
HEARING

CLEARFIELD—District Attorney Thomas F. Morgan and Assistant District Attorney F. Cortz Bell III will present arguments opposing a petition for habeus corpus filed by Jon Yount, formerly of DuBois, twice-convicted of murder.

The hearing on the petition takes place at 10 a.m. Nov. 3 before Magistrate Robert C. Mitchell is U.S. District Court for the Western District of Pennsylvania.

Yount was convicted in 1966 and 1970 of the murder of Pamela Sue Rimer of Luthersburg, a student at DuBois Area Senior High School.

He is challenging his state conviction in federal court. He claims his statement to police were taken in violation of his Miranda rights, his right to empanel a fair jury was violated because of prejudicial media accounts, the jury was improperly charged, and his counsel was ineffective, according to Mr. Bell. conviction in federal court. He

Please Turn to Page 2, Col. 3

10/10/81 DuBois C-E page 2

Will Oppose...

(Continued from Page One)

claims his statement to police were taken in violation of his Miranda rights, his right to empanel a fair jury

was violated because of prejudicial media accounts, the jury was improperly charged, and his counsel was ineffective, according to Mr. Bell.

The petition was filed this spring. A federal public defender has been appointed by the court. The district attorney will raise objections to some of Yount's claims, according to a statement from Bell.

The state pardons board is still considering Yount's eighth petition for life on parole. A hearing took place in June.

EXHIBIT P-1-eee

INSIGNE

By

GEORGE WAYLONIS

The Jon Yount Story, apparently, is not over.

In addition to the appeals filed by his defense attorneys, it appears that psychiatrists and psychologists are going to take a long, academic look at this model school-teacher who suddenly plunged to violence.

This reporter believes that within a few years there will be technical articles written on the split personality of Jon Yount. These will be written for the journals of psychiatry.

The Courier-Express continually receives inquiries from professional men wanting material which was published in this newspaper. And these requests come from persons who do not have a delight in tragedy, or

a morbid interest in what unfolded on that lonely country road in Brady twp. last April.

The defendant in the celebrated murder trial was examined by two groups of psychiatrists and psychologists. Much of their conclusions will never be released because material of this nature is of a confidential nature. Only that revealed in open court is available to the general public.

The findings of the medical team at Warren State Hospital, where Yount was first examined, will remain highly confidential. State institutions have a strict rule regarding such information. In fact, during the trial, these medical men told the defense attorney they had more information they could place on the record. After hearing this, the defense decided not to quiz these witnesses any further.

But "civilian" medical men at Pittsburgh also conducted examinations. What they will eventually do with their findings is open to speculation. These men were and are deeply stimulated, professionally, by what they learned about Jon E. Yount.

And this is understandable. For the principals came from good homes, and had had opportunities for the good life.

It is this reporter's belief that someday a book or a portion of a book, will be written about The Jon E. Yount Story.

This is more credible today, what with the financial success that is enjoyed by "In Cold Blood" a documentary of the mass killings of a family in Kansas. Writer Truman Capote has pioneered a new type of documentation that, undoubtedly, other writers will copy.

EXHIBIT P-1-fff

DA RECEIVING LETTERS OPPOSING RELEASE
OF YOUNT

CLEARFIELD — The district attorney's office here says letters opposing the release of Jon Yount from prison will be forwarded to the state Board of Pardons in Harrisburg.

Yount, twice-convicted murderer, has made his eighth bid for clemency. He has applied to the state Board of Pardons to have his life sentence commuted to life on parole.

Letters opposing the release are to be sent to: Clearfield County District Attorney, P.O. Box 887, 231 E. Market St., Clearfield, 16830.

A hearing on the 43-year-old former DuBois math teacher's appeal will take place during June in Pittsburgh. A representative of the district attorney's office will present arguments opposing the sentence commutation at that time.

EXHIBIT P-1-ggg

YOUNT TRYING FOR PAROLE EIGHTH TIME

Jon Yount, twice-convicted murderer formerly of DuBois, will try for the eighth time to have his life sentence commuted to life on parole.

The Clearfield County District Attorney's Office learned Monday of Yount's latest automatic appeal. He is entitled to one appeal a year, the office spokeswoman explains.

His last appeal was heard on Nov. 20 in Pittsburgh. The appeal was turned down by the state Board of Pardons early this year, it is noted.

The latest appeal will be heard in Pittsburgh during June. The DA's office will be represented at the arguments.

Mr. Yount, who has spent the past 14 years behind bars, was convicted in 1966 and again in 1970 of the first degree murder of his high school math student, 18-year-old Pamela Sue Rimer of Luthersburg RD 1. He was a former DuBois Area Senior High School math teacher.

He has been imprisoned since the morning after the April 1966 slaying when he presented himself to DuBois State Police.

He is currently incarcerated in the State Corrections Institute at Camp Hill.

PLAINTIFF'S EXHIBIT NO. 5

THE DUBOIS COURIER-EXPRESS TUESDAY
10/6/81
PAGE 1

YOUNT CHALLENGING STATE CONVICTION IN
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Yount is challenging his state conviction in federal court Mr. Morgan said. A hearing on the petition will take place Nov. 3 in Pittsburgh. The district attorney's office will be represented at the hearing.

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The board has not yet handed down a decision.

THE DUBOIS COURIER-EXPRESS SATURDAY
10/10/81
PAGES 1 & 2

WILL OPPOSE YOUNT PETITION AT NOV. 3
HEARING

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Please Turn to Page 2, Col. 3

Will Oppose...

(Continued from Page One)

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-234

Jon E. Yount,

Petitioner,

vs.

Harvey Bartle, III, Attorney General of Pennsylvania,

Respondent.

Transcript of Proceedings of continued evidentiary hearing in the above-entitled action held on December 28, 1981, before Robert Mitchell, United States Magistrate.

Appearances:

For the Petitioner [sic]: F. Cortez Bell, III, Assistant District Attorney, Clearfield County, P. O. Box 887, Clearfield, Pa. 16830.

For the Respondent [sic]: George E. Schumacher, 590 Centre City Tower, 650 Smithfield Street, Pittsburgh, Pa. 15222.

[2] (The following proceedings were held beginning at 10:30 a.m., on December 28, 1981, before Robert Mitchell, United States Magistrate, Pittsburgh, Pennsylvania.)

THE COURT: This is the continued evidentiary hearing in the case of Jon Yount vs. Harvey Bartle III, et al., Civil Action 81-234.

Sir, you are Mr. Yount?

THE DEFENDANT: Yes.

THE COURT: You are represented by Mr. Schumacher?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Bell, you are representing the Commonwealth?

MR. BELL: Yes, your Honor.

THE COURT: I scheduled this hearing, I will note for the record, over the opposition of the petitioner to any further evidence being taken. Nevertheless, it is my opinion that although it might have been more convenient to take the testimony at the first hearing, there is certainly no delay here and we are still within our briefing schedule we set at the last hearing. I should also indicate since we have last met I have read the entire voir dire transcript word for word. Just so everybody knows, I have read it. Mr. Bell, you requested the hearings. Do you want to proceed?

[3] MR. BELL: Thank you very much, your Honor. At this time I call Judge John Cherry to the stand.

JOHN A. CHERRY being first duly sworn, testified as follows:

BY MR. BELL:

Q. Would you please state your name for the record?

A. John A. Cherry.

Q. And what is your occupation currently?

A. Common Pleas judge, senior judge, retired.

Q. Judge Cherry, were you also the judge with regard to the two trials involving Commonwealth of Pennsylvania vs. John Yount?

A. I was.

Q. It is my understanding one trial occurred in 1966 and one occurred in 1970. Is that correct?

A. Within my recollection, yes. It was a period of some two or three years, perhaps four, after the first one.

Q. All right. During those two trials, where did those two trials take place?

A. In Clearfield County.

Q. At the time of the trials what was your position at that time?

A. I was the president judge. In fact, I was the [4] only judge in the county. It is a one-judge county at the present time yet.

Q. Judge Cherry, just briefly to your qualifications prior to becoming a judge, did you attend law school?

A. I did. I graduated from the University of Michigan. From there I went to the law school at Dickinson School of Law in Carlisle, graduated in 1936 and practiced until 1963.

Q. And is that the time when you were first elected judge?

A. That is correct. I assumed office on the 7th of January 1964.

Q. Now, Judge Cherry, I assume during the course of your practice you were also admitted before the various courts of the Commonwealth of Pennsylvania?

A. I was.

Q. Judge Cherry, directing your attention first of all to the first trial and the circumstances surrounding the first trial, do you have any recollections as to any newspaper accounts or publicity as to the first trial in the press?

A. Well, I don't believe that I could give you detail for detail, but I do recall that there were presented various items by counsel for the defendant.

[5] Q. What were the nature of those?

A. Just a minute. I would like to add one thing. It was always my practice not only to instruct the jury to do so, but I did myself refrain from reading any articles concerning my cases, large or small.

Q. Now, you have indicated you did instruct that particular jury not to read any articles, is that so?

A. I did so. Almost every recess, if not every recess. The record would have to be viewed for that. I have not read the record.

Q. O.K. At any point did you ever have occasion to give the press any instructions as to what their role should be?

A. Oh, yes, I did.

Q. Could you please relate for the Court what if anything occurred?

A. I told them to be very careful not to offer any opinions and not to write anything that would be detrimental to the interests of the defendant in any respect. They were allowed to relate what would have been or what would be later testified to.

Q. Now, with regard to the conduct of the first trial in particular, Mr. King has testified here previously before this Court with regard to the conduct of the spectators within the courtroom in that they applauded and [6] booed, et cetera. Do you have any recollection as to the conduct of any spectators during the first trial?

A. I do not.

Q. Do you have any knowledge as to whether anyone ever was unruly, applauded, booed, et cetera?

A. Certainly not in my recollection, and I am quite sure that would appear of record, because I certainly would have taken care of the situation and directed them not to engage in that. I might add, however, that the mother and father both I think broke down in court.

Q. Of the victim?

A. Yes, but a recess was immediately called and the record would have to show that also.

Q. Now, Judge Cherry, as a result of the first trial, a conviction was gained, and Mr. King testified Mr. Yount was immediately sentenced that very same day when the verdict was returned. Do you have any recollection as to when he was sentenced?

A. I did not think it was immediately. I don't believe it would have been too long after the period for filing motions would pass.

Q. The post-trial motions?

A. The post-trial motions.

Q. And were to your knowledge post-trial motions filed with regard to the first trial?

[7] A. Oh, definitely.

Q. Now, during the course of the first trial do you have any recollection, as to the number of spectators within the courtroom, outside of the courtroom, et cetera?

A. I made no record at that time. That was near the commencement of my ten years in office. I didn't quite get to the point where I got later, but I would say that there were a number of people in the courtroom, yes, in the first trial.

Q. Now, Judge Cherry, I believe the first conviction was appealed up through the court system, et cetera, is that correct?

A. That is correct.

Q. And as a result of that, a second trial was necessary?

A. Yes. It was reversed on the basis that certain portion of his confession was allowed in, and of course it was reversed on that basis.

Q. As a result of the Miranda decision?

A. The Miranda decision. A portion of the confession was kept in because it was held to be before there was any thought of an arrest of the individual.

Q. Now, Judge Cherry, turning our thoughts for a moment to the second trial with regard to the Commonwealth of Pennsylvania vs. John Yount, at any point were a change [8] of venue motions presented to the Court by the defense counsel, Mr. King?

A. Oh, yes.

Q. Do you happen to recall on how many occasions those occurred?

A. It was quite a number of times. I don't remember how many.

Q. Did these occur during voir dire mainly or during the course of trial?

A. Prior to trial, during the voir dire, and after. After that would have been a motion for mistrial on various occurrences during trial.

Q. But you do recollect that there were a number of motions filed?

A. Yes, there were.

Q. With regard to each one of those motions did you consider those motions separately on each occasion they were presented?

A. I did.

Q. Could you relate to the Court what if anything occurred with regard to these motions once they were raised to the Court?

A. They were denied. They were refused. Whenever I was asked to review something, I did it, and I certainly determined that it was not any detrimental effect to the [9] defendant.

Q. Now, Judge Cherry, you were present also I assume during the voir dire of the second trial, is that correct?

A. Oh, yes.

Q. You heard all the questions asked of the various persons?

A. Yes.

Q. Now, Mr. King testified at our previous hearing at that one point an indication had been made to him that if you did not get the panel within this one group of jurors that his motion for change of venue would be granted. Do you have any recollection as to that?

A. I certainly do not.

Q. Do you believe that you made indication such as that?

A. I do not.

Q. Now, I believe that several panels were gone through during the course of the second jury selection, is that correct?

A. Yes.

Q. Do you have any recollection as to the number of panels that were called or the means by which those panels were obtained?

A. I am sorry, I don't. Possibly two or three.
[10] At least two, but I would think three.

Q. Now, at any point during the voir dire examination was that open to the public or was the courtroom closed, or do you have any recollection?

A. My recollection is that it was not closed.

Q. What about during the course of trial? At any point was the second trial closed to the public?

A. Oh, never. I don't believe in either trial. Never was it closed.

Q. Were any precautions taken during the course of any one of the trials with regard to spectators that might enter?

A. Yes. Prior to the first trial there had been an indication that a member of the family had made serious threats against the defendant and it had been called to my attention, and of course I asked the sheriff and his deputies to be very careful to observe, and in cases where they thought it proper and necessary, to search individuals. I can't recall ever having a report that they were searched.

Q. Is that a standard precaution that you would use in a case such as this?

A. Oh, my, yes. I did in every murder case.

Q. Approximately how many murder cases have you presided over?

[11] A. I suppose ten. At that time it would only have been four on the second trial. The first trial, it would have been two, I think.

Q. Now, at any point during the course of jury selection did you of your own motion cease jury selection for any reason, to your knowledge?

A. I would believe that would be on the record. I do not recollect, but if it occurred, it would certainly be on the record.

Q. Once again with regard to the second trial and the voir dire, do you have any knowledge or information with regard to the number of spectators present in the courtroom throughout either one of those proceedings?

A. There were quite a few people during the course of the first trial. Students would come in after the school let out and they would jam the courtroom. Some of the courthouse personnel would be up there at coffee breaks or what not, but at the second trial there were very, very few spectators. By that time I was making notes occasionally in my rough notes that I took, and I took and I still do take very voluminous notes in the trial and I would make notes occasionally of how many people were there. I did for your purposes look over the notes of the second trial, my notes, and I noted on the first day that outside of court personnel, there were only about three people, [12] three spectators other than family or witnesses.

Q. That is—

A. Of course witnesses were segregated and they only remained in the courtroom after their testimony was concluded.

Q. So these three or four witnesses at the beginning of trial, that was during the actual second trial itself, is that correct?

A. That was at the start of the trial, yes. I couldn't find where I made any records during the period except at a recess, perhaps, and I found that on that first day,

and I think, I believe you will see there I noted there were about ten spectators.

Q. Did you continue to make these notes throughout the course of trial as to the number of spectators present?

A. I tried to speed-read through those. I think I found only four. I found one where there might have been twenty spectators, one ten, two notations of three, and at the close of the case, I think I noted that there were some ten spectators.

Q. That was during closing arguments?

A. At the close of the case, yes.

Q. Now, Judge Cherry, as a result of the second trial I believe once again a conviction arose, is that [13] correct?

A. Yes. Well, it was a conviction on the homicide. There was a conviction of rape and homicide the first time. In the second trial, because of the reversal, Judge Reilly chose not to, well, then he was District Attorney, he chose not to proceed with the rape because he lost the major portion of his evidence through the lack of the use of confession with regard to that, so we proceeded solely on the other.

Q. So it is your understanding that the rape charge was not prosecuted at the second trial due to the prosecution's determination rather than something the Supreme Court had done, is that correct?

A. Well, yes, because the Supreme Court throwing out the whole of the confession which related to the rape, but they did not reverse without the right to try the rape case. That was a choice of DA Reilly, I will have to say that.

Q. Now, Judge Cherry, in your recollection can you think of anything that would indicate to you that Mr.

Yount received a trial by someone who was not impartial towards his cause?

MR. SCHUMACHER: Objection, your Honor. It calls for an opinion that is the basic subject matter of this litigation.

[14] THE COURT: If I understand your question correctly, I think the objection is well taken.

BY MR. BELL:

Q. Judge Cherry, do you have any recollection as to the number of people within each number of panels that were called for voir dire examination?

A. Well, probably 125.

Q. At that time were the panels normally called for criminal court 125 persons?

A. Somewhere around that number. There was another whole group summoned through the sheriff's office when we had exhausted the first panel, but I threw all of that out on the objections of Mr. King because he felt, and I agreed with him, that if he were correct and I accepted it, that if they did not just grab hold of a shoulder and say come, but merely asked if they were available, I think that was the objection. I don't recall that exactly. There was some objection on his part and I said, well, we will take no chance, we will throw all of it out, and I did, I accepted his attack upon it.

Q. Now, it is your recollection that at no time did you indicate that you were going to grant his motion for change of venue if you didn't seat a jury?

A. I am certain of that, but I think the record ought to show any of that if it existed because that is [15] something that certainly would not be an off-the-cuff thing walking down the hall, so to speak, or anything like that. I am sure that would not be done.

Q. At any point, did you keep anything off the record that defense counsel indicated to the Court that he wished to have placed on the record?

A. Never. I never as to any case. I am sure counsel would object if I tried. I don't understand the question, but all right.

MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher.

Cross-Examination

BY MR. SCHUMACHER:

Q. You indicated, sir, that you were the presiding judge at both trials of Mr. Yount, correct?

A. Yes. We are only a one-judge county, and of course, you take the trials as they come.

Q. How many years have you resided in Clearfield County?

A. 72 years, lacking two months.

Q. And—

A. I am still living there.

Q. I hope for a long time in the the future.

A. I do too.

Q. Judge, during the period of time in 1966 to [16] 1970, where did you reside in Clearfield County?

A. My home town where I was born, DuBois.

Q. I believe you indicated on direct examination that you were elected to a judge for the first time in 1964?

A. For the only time. I was elected in November of 1963, but I assumed the bench January 7, 1964.

Q. When you say the only time, is that then a life-time situation when you assume the bench?

A. No, it is not lifetime. It is a ten-year term. I chose not to run on a yes or no. I had personal reasons for never having wanted to run the second time, but I remained a judge because of the Constitution of the Commonwealth of Pennsylvania which declares that if you have never been defeated in an election and you choose to do so and have completed at that time have completed ten years as a judge, which was your term of office, you could elect to remain a judge at the assignment of the Supreme Court of Pennsylvania. If you were ever to practice law, even one item, you forfeited it all, but I never did. I went right in to the senior judgeship and have continued so until the present day.

Q. So you were the sitting judge in Clearfield County from 1964 for a period of ten years?

A. President judge, yes.

Q. And then you assumed the responsibilities of [17] Senior Judge?

A. That is correct.

Q. I understand. And since there is one judge in Clearfield County, might we assume there is also one courtroom?

A. Well, yes, one courtroom. There had been two, but only one, and there still is only one.

Q. And were both of these trials tried in the same courtroom?

A. Yes, they were.

Q. And that of course was your courtroom?

A. That is correct.

Q. And so you must be familiar with the seating capacity of the courtroom?

A. Well, I have never numbered them, but I would assume that shoulder to shoulder, it would hold approximately a hundred.

Q. And during the first trial when you indicated the students arrived after school and a number of other people came as spectators for the first trial that took place in 1966, would there have been occasions when the courtroom was full?

A. The first trial?

Q. Yes, sir.

A. I would think so, yes.

[18] Q. Do you recall an occasion when Mr. Yount testified when the doors of the courtroom were opened and people were standing out in the hallway observing his testimony?

A. I don't recall that, I am sorry. I would think, though, that there might have been people waiting out there because there were times when the courtroom was filled.

Q. Sir, you referred to your instructions of the news media. Did that pertain to their coverage of the actual trial of the case?

A. Oh, definitely. By that time we were pretty well informed as to what we were to do with the new rules that had emanated through the decisions of the United States Supreme Court.

Q. The instructions concerning the trial did not apply to pre-trial or post-trial coverage, isn't that correct?

A. Well, they weren't even allowed on pre-trial on various motions. Certain motions that were made pre-trial and we were required to keep everyone else out except the Court personnel and the parties who were involved.

Q. I would call your attention to the voir dire of the second trial that took place in 1970, and on direct examination you were asked whether or not you recalled the [19] courtroom being closed during any period of time. Sir, I would ask whether or not the difficulty that you and

counsel had in selecting a jury might have created a situation where you didn't want prospective jurors to hear any of the questions that were being asked?

A. Oh, they were not permitted. That was individual voir dire, and all prospective jurors were kept out, and I think you will note or the record speaks for itself, I don't know whether that is in there, but there were times, time and time again I would declare to a panel of jurors, you are not to declare anything that you are testifying to on voir dire to any prospective jurors of any kind.

Q. As best you can recall, can you explain to the Court how the selection of each juror took place within the courtroom?

A. They would be, the court officer would be sent out of the courtroom on the pulling of a name out of the wheel. It is not truly a wheel, it is a square box in our county. The wheel is one which is operated by the jury commissioners, but once the clerk of courts has it in his hand, those jurors which have been selected by the jury commissioners by lot are placed in that box and then the clerk of courts draws a name out. He calls it and then the court officer goes out and gets the juror and brings them [20] in, and that gives me some faint recollection that we didn't allow anybody in there during the examination, but I can't swear to that.

Q. I understand.

A. The record probably would show that. I don't know.

Q. You also testified concerning a member of the family that made a serious threat against Mr. Yount?

A. That was reported. I never carried it further. I just assumed when the sheriff so reported to me I declared I wanted extra care used at all times.

Q. Do you recall whether or not he reported to you the fact that a member of the family had a weapon?

A. I think that is true too.

Q. And do recall whether or not that incident took place in the first or second trial?

A. The first.

Q. I believe that you also testified on direct examination that you sat as the judge in charge of ten murder cases in Clearfield County during the period of time?

A. Not all in Clearfield County. I was assigned to other murder cases in Allegheny County, Blair County, Clearfield County and Butler County. I believe those are all the counties.

[21] Q. During the ten-year period of time that you were the sole judge in Clearfield County, do you recall how many first degree murder trials you would have been involved in, general homicide, which may have resulted in first degree?

A. Yes, sir.

I think the first case that Judge Reilly as DA and I as judge tried of any kind was a murder case, general homicide which resulted in first degree murder charge with the death penalty, the death penalty was thrown out by the Supreme Court, and the man is still serving, that was *Commonwealth v. Aljoe*.

Q. You mean the first case you were sitting as a judge?

A. Outside of some ordinary thing. I can't think of the lady's name, but a lady was charged with first degree murder of her brother. She was convicted, but not of first degree. *Commonwealth v. Lyons* was the killing of a policeman. That resulted in second degree. These were all within the first about two to three years of my ten-years in office. It might have been five or six there.

Q. Any of those involve rape other than Mr. Yount?

A. I don't recall it. It may have, but I don't recall it.

[22] Q. A number of times on direct examination, Judge, you responded that you didn't recall precisely what had occurred at the various trials, but whatever did occur would be on the record?

A. You mean in the course of trial?

Q. Yes, sir.

A. Well, I remember what occurred. What do you mean by what occurred?

Q. My point is whatever did occur, is it your position—

A. That called for a ruling?

Q. Would be on the record?

A. I would think so if it called for a ruling.

Q. And that was your normal procedure in any trial, to put whatever you felt was appropriate either by testimony or legal rulings on the record?

A. I would think so.

Q. So that way it would be transcribed and reported for future use?

A. Yes.

Q. And therefore that would be for the benefit in a criminal case of both the Commonwealth and the defendant?

A. I tried to be fair to everybody.

Q. Yes, sir.

A. I think in this case I would like to interpose [23] right here that I believe if you will look at the voir dire—

MR. SCHUMACHER: Excuse me, your Honor. I would ask the witness be instructed to only answer the questions asked.

THE WITNESS: I think you called for it, but I am not going to argue with you.

Have you ruled?

THE COURT: No, I was going to try to avoid it.

MR. SCHUMACHER: I was going to try to move on.

THE WITNESS: I think you called for it, but we will refrain.

BY MR. SCHUMACHER:

Q. When referring to your notes, sir, that you made during the second trial—

A. They are here. I brought them.

Q. As to the number of people that were in the courtroom?

A. They are here. I have folded over the sheets. I can't say that is all of them. I tried to leaf through them. I am a sitting judge and I am not going to go through everything.

Q. My question is that in arriving at the numbers, the total numbers that you testified to on direct [24] examination, I believe you indicated that you excluded members of the family?

A. Yes. Yes.

Q. In other words, there were spectators in the courtroom that were either related to the Rimers or were friends of the Rimers?

A. That is correct.

Q. And you did not include them in your calculations?

A. No.

Q. And there were individuals in the courtroom that were either—

A. Wait, friends, I didn't know his friends. I had better correct you on that. Where I knew they were members of the family, they were not included. There may have been friends. In fact, in the second trial there were friends, there were teaching friends of the defendant who were allowed in, and my recollection is we did not segregate defense witnesses. We segregated only Commonwealth witnesses.

Q. Well, you knew the members of the Rimer family in order to—

A. Oh, yes.

Q. —to make your calculations?

A. When you say did I know the members, I want to [25] be accurate here. I knew his sister, his father, his mother, yes.

Q. And you knew who the members of the Yount family were, is that correct?

A. I thought that is who you were talking about.

Q. If I didn't say Rimer the first time—

A. Well, if you said Rimer, I knew the grandfather and grandmother of the Rimers also. I am not sure that I knew Mr. Yount's grandfather and grandmother. I knew his father and mother.

Q. You did know members of each family, the Rimer family and the Yount family?

A. Oh, yes. I knew Mr. Yount himself. He taught my son.

Q. And I believe you indicated that there were court personnel that would be occasionally present at the second trial?

A. They would always be present. The sheriff and deputy sheriff. I am talking about tipstiffs and court crier. That is court personnel to me. I am not talking about courthouse. I included courthouse in the number that I would put down there.

Q. That was what I was referring to. Frequently in any criminal county courthouse employees are attracted to various types of cases, and I am trying to ascertain whether [26] or not you included such people in your calculation?

A. I certainly did. There wouldn't be too many at any one time, because if you know our commissioners, they kept track of what everybody was doing.

Q. Keep them working, not spectators?

A. You can be sure.

Q. Sir, the members of the news media were regularly in attendance, were they not?

A. Yes. There would be about three, sometimes four. There would be a representative of each of the two newspapers, the DuBois Courier Express, and the Clearfield Progress, and then I believe a Mr. Kennedy, I don't remember his first name, might have been up there again. He started to be interested in Clearfield County at the time of the Aljoe murder trial, and he wrote it up as city editors will in a way that he felt it gave everybody the correct picture of a kind of county it was and things of that nature. I think he came up. I am not sure of that. There may have been only the two at the second trial, two DuBois papers.

Q. Did you require them to station themselves in any particular place in the courtroom?

A. Yes. Their own table off to the right of defense table.

Q. I see. So then there were three tables in the courtroom, one for prosecuting attorneys?

[27] A. Yes, and then defense, and then to the right of defense counsel, the newspaper.

Q. Was that the same procedure that was utilized in the first trial?

A. Oh, yes. There were times they would not seat themselves there because they wanted to get a better view of a witness on the stand so they would sit back in the spectators section of the courtroom. I believe the Clearfield Progress reporter was the most attentive to that.

MR. SCHUMACHER: No further questions.

THE COURT: Judge, I have one question. I am not even sure of its relevance, but had a change of venue been granted, what would that have entailed as far as the obligations placed upon the county? The jury was sequestered anyway during the trial.

A. Oh, the change of venue rule at that time was that you chose your jury in another county long distant from DuBois and Clearfield, the whole County of Clearfield, and you tried your case there, and so all of the personnel of the county court, including the sheriff, the sheriff's deputies, tipstuffs and so on, would be taken to that county. The rule was not what it is today, that you may go to some other county by assignment of the Supreme Court and choose a jury and bring it back to Clearfield County.

Q. You would have had to move the entire court?

[28] A. You would have to move the entire court, the judge would have to stay there and be ready for any rulings that had to be made. Of course I wouldn't have objected, your Honor, if I could have been away.

THE COURT: To Palm Beach County. Mr. Bell.

MR. BELL: Just two brief questions on redirect.

Redirect Examination

BY MR. BELL:

Q. We have had testimony about a weapon supposedly in the hands of the member of the victim's family?

A. Yes.

Q. Did that occur at the courthouse?

A. No, it was supposed to have occurred in the jail and was prior to any trial.

Q. So the weapon was not in the actual courtroom?

A. Oh, no.

Q. And you indicated on cross-examination that some of the pre-trial matters with regard to I believe you were discussing the first trial at that time were held in camera without the press or anyone else?

A. Yes, motion to suppress testimony. Motion to suppress certain items, physical items of evidence, and that was carried through on the appeals also. The one I remember [29] distinctly is a pocket knife which was referred to.

MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher.

Recross-Examination

BY MR. SCHUMACHER:

Q. Those motions that would have been heard in camera, they would have been transcribed by a court reporter?

A. Oh, absolutely. Well, not in camera, they would be held in the courtroom and we would not allow any witnesses in there. Under the rules of the Supreme Court at that time, and we would sequester the testimony; that is, we would order it be locked up and not viewed by anyone except upon an order of court, not even the Court got that testimony afterwards.

Q. But it was transcribed?

A. Oh, yes. Sure.

Q. Do you recall after Mr. Yount's second conviction he was ultimately sent to Rockview?

A. Oh, yes.

Q. Do you remember the community opposition against that?

A. Against his being sent to Rockview?

Q. Yes, because it was a minimum security prison rather than the maximum security prison where he had been?

A. If it ever came to my attention I have [30] completely forgotten it. I don't recall. I recall there was a lot of community feeling towards him, but the community feeling would be after he was sent to prison and the mother still is very active in trying to seek his detention in prison, if that is what you are referring to.

Q. Well, there was community interest in preventing him from receiving any release from prison through parole or pardon?

A. Oh, very definitely, yes, but there was nothing of that sort that occurred during trial.

MR. SCHUMACHER: Nothing further, your Honor.

THE COURT: Anything further?

MR. BELL: Nothing further.

THE COURT: Thank you, Judge.

MR. BELL: Your Honor, if there is no further need for Judge Cherry, might he be excused?

THE COURT: Fine.

(The witness stepped down.)

MR. BELL: Your Honor, we would like to call Judge Reilly to the stand.

JOHN K. REILLY, JR., being first duly sworn, testified as follows:

BY MR. BELL:

Q. Would you please state your full name for the record?

[31] A. John K. Reilly, Jr.

Q. And Mr. Reilly, what is the nature of your employment currently?

A. I am president judge of Clearfield County.

Q. When were you elected to that position?

A. 1973.

Q. When did you first assume that position?

A. January 1974.

Q. Now, during the course of the trials of Commonwealth of Pennsylvania vs. John E. Yount that occurred in 1966 and 1970, I believe, what was the nature of your employment at that time?

A. I was the District Attorney of Clearfield County.

Q. And do you recall when you first assumed that position within Clearfield County?

A. 1964.

Q. And so did you serve from 1964 until your election to the bench as District Attorney?

A. Yes, sir.

Q. And you are in fact the person who prosecuted both of these cases, is that correct?

A. I did.

Q. Did you have any assistants with you at the time of these various cases that aided you in the [32] prosecution?

A. Assistant District Attorneys?

Q. Yes.

A. I had one.

Q. Who was that?

A. Mr. Irving Finnell.

Q. But basically through the course of these two trials, you were chief prosecutor?

A. I was.

Q. Now, Judge Reilly, prior to your assuming the position of District Attorney, could you relate what your legal education was, et cetera?

A. I graduated from Dickinson School of Law in 1964, was admitted to the Pennsylvania Bar Association and the Clearfield County Bar Association in 1961 and practiced privately and as District Attorney until 1974 when I took the bench.

Q. Now, the District Attorney position prior to the time that you took the bench, that was a part-time position?

A. Yes.

Q. And you could practice privately also?

A. Yes.

Q. Now, Judge Reilly, turning your attention to the first trial that occurred in 1966, there have been [33] vari-

ous indications that the courtroom was filled, the hallway may have been filled, et cetera. Do you have any recollection as to the number of people present within the courtroom or outside the courthouse during the first trial?

A. I recall no spectators outside the courtroom. That is not to say there were none there. I have no recollection of them. The courtroom itself I believe was fairly full.

Q. Do you have any knowledge of your own as to the number of persons who can be seated within the courtroom?

A. Yes, I do.

Q. And could you please relate for us the number?

A. Two hundred.

Q. And is there any means by which you know that particular number?

A. Yes, there is.

Q. Could you please relate why you know that number?

A. Clearfield County for the last at least seven years has been in the process of attempting to build a new courthouse, and in aiding and planning the courtroom facilities for the new courthouse, we did measurements and studies as to what the present courtroom can hold and what we would hope to be able to accommodate in the new [34] courthouse, so I know that the spectators' section in our courtroom will hold two hundred spectators.

Q. And that is the same courtroom as used during both of the Yount trials?

A. Yes, sir.

Q. Do you have any recollection as to persons outside of the courthouse on the courthouse grounds, et cetera, during the first trial?

A. You mean with regards to the trial itself?

Q. I believe Mr. King indicated that at one point the crowds were packing the courthouse square, even on to the street in front of the courthouse. Do you have any recollection of that?

A. Yes. That did not occur.

Q. Now, with regard to the conduct of the spectators during the course of the from first trial, do you have any recollection as to whether they applauded or booed, et cetera?

A. No, they did not.

Q. Now, the first trial resulted in a conviction, is that correct?

A. Yes, sir.

Q. And that was subsequently appealed, I believe?

A. By the defendant.

Q. Now, at one point I believe the Philadelphia [35] District Attorney's office became involved to some extent in briefing the case, is that correct?

A. At my request.

Q. Would you please indicate what part, if any, they played in any of the appeals on the case?

A. We found ourselves in an unique situation in this particular case in that the offense occurred in April of 1966, the Miranda decision from the Supreme Court of the United States came down in June of 1966. At that time we felt that since these occurrences had taken place prior to Miranda, perhaps we should not be subject as stringently to the ruling in that case. The Supreme Court of Pennsylvania disagreed and we petitioned for certiorari to the United States Supreme Court at that time. Once we had made the decision to petition for cert, we engaged the services of the Philadelphia District Attorney's office to help us in preparing the petitions to the Supreme Court.

Q. Now, as a result of those petitions, they were denied by the Supreme Court, is that correct?

A. Cert was denied.

Q. So the case was once again retried within Clearfield County?

A. That is right.

Q. Now, the initial trial involved rape and murder and the second trial involved only murder. Would you [36] please relate to the Court what if any decisions you made as to what charges were prosecuted?

A. When it became apparent we were going to have to retry the defendant, we went through or examined the Supreme Court decision quite carefully, determined what we felt in our opinion would still be admissible at the second trial, and based on that, determined that we would have insufficient evidence to sustain a charge of rape, so as prosecutor, I decided to proceed only on the charge of murder.

Q. Now, then it is my understanding that was your decision as a prosecutor rather than the Supreme Court indicated go you could not proceed on the rape charges, is that correct?

A. That is right.

Q. Now, just prior to the beginning of the second trial and even in to the voir dire examination, were there various change of venue motions presented to the Court?

A. There were.

Q. Do you have any recollection as to the number of them or how often they occurred?

A. My recollection is that prior to commencement of jury selection there was one and that thereafter during the course of jury selection it was a daily motion.

Q. Each time one of these motions were made, do [37] you have any recollection as to what Judge Cherry did with them? What if anything occurred?

A. I believe that the pre-trial motion included taking of testimony and introduction of exhibits. Once voir dire commenced, I don't believe that any testimony was taken, but I believe Judge Cherry just ruled on the motion at that time.

Q. And you indicated during voir dire these were almost daily motions?

A. I believe they were.

Q. Now during the course of the second trial do you have any recollection as to the number of persons present in the courtroom during the course of the trial?

A. I don't have any exact recollection. The manner in which our courtroom is situated, counsel sits with his back to spectators' section, so I didn't have a continuous view of the spectators section. I know that the number in the courtroom was less than at the first trial, but to be more specific, I would hesitate to testify.

Q. During the course of the jury selection for the second trial I believe Judge Cherry indicated that a panel at that time consisted of 125 persons. Did you go through numerous persons with regard to the voir dire?

A. Well, we went through more than one.

Q. Were those full panels of 125 people?

[38] A. I don't believe they were, and I don't believe the first panel consisted of 125. I think that may have been the number called, but after excuses were granted and what not, it is my recollection that a considerably lesser number was actually available for voir dire.

Q. Were you present during all of the change of venue motions or discussions had before the Court?

A. I was certainly present at all the motions because I argued in opposition to them.

Q. Do you have any recollection of Judge Cherry indicating to defense counsel that if a jury was not seated within a certain period of time or before the exhaustion of a certain panel that he would grant the change of venue motion?

A. Do I recall that?

Q. Yes.

A. I do not.

Q. At any time during the course of the second trial was the courtroom ever closed, to your recollection?

A. Closed to spectators?

Q. Yes, to the public?

A. It may have been during voir dire. Certainly the prospective jurors were excluded. Whether spectators were excluded at that time, I do not recall, but during the course of the trial itself, the courtroom was not closed, to my [39] recollection.

Q. At any point do you have any recollection of the Court during voir dire stopping voir dire on its own motion for purposes of change of venue discussions?

A. On its own motion, I do not recall that.

Q. Now, the second trial I believe also resulted in conviction, is that correct?

A. Of murder in the first degree, yes.

Q. And were various post-trial motions filed by defense counsel with regard to the second trial?

A. Yes.

Q. And do you have any recollection whether any of those motions dealt with the change of venue issue?

A. Yes, they did.

Q. And do you happen to know the result or who ruled on the second appeal of the second trial. Was that the Pennsylvania Supreme Court?

A. That is correct.

Q. What was the result of their ruling?

A. The conviction was affirmed.

MR. BELL: I have no further questions, your Honor.

THE COURT: Mr. Schumacher.

Cross-Examination

BY MR. SCHUMACHER:

[40] Q. As the District Attorney in the first trial of Mr. Yount in 1966, it was your responsibility to present evidence on behalf of the Commonwealth of Pennsylvania that you felt, sir, in your opinion would result in his conviction of first degree murder, is that correct?

A. Basically. I believe the District Attorney's duties and obligations extended beyond that, but certainly that is part of them.

Q. When you argued to the jury after the close of testimony in that case, did you not argue that he was guilty of first degree murder?

A. Yes, sir, I did.

Q. And was that not part of your responsibility as the District Attorney at that time?

A. I felt at that time it was my duty to present to the jury all the evidence bearing on the case and to present to them the position of the Commonwealth, yes.

Q. And did you not seek a death penalty at that time?

A. No. I did not withdraw that option from the jury. The jury had that option.

Q. And following Mr. Yount's first conviction after the 1966 trial, you continued to represent the Commonwealth in connection with the appeals taken on Mr. Yount's behalf, is that correct, sir?

[41] A. Yes, sir.

Q. And that was through the ultimate reversal by the Pennsylvania Supreme Court?

A. That is correct.

Q. And then as I understand your testimony, judge, you then secured the services of the Philadelphia District Attorney's office to attempt to have the Supreme Court of the United States grant certiorari in the case?

A. That is correct. I had no idea how to go about that myself.

Q. And that application was denied by the Supreme Court?

A. It was.

Q. So then the case I presume was returned to Clearfield County for retrial?

A. Yes.

Q. Then you continued to represent the Commonwealth in the second trial?

A. I did.

Q. And you in fact were trial and lead counsel?

A. That is correct.

Q. And at that time you again sought a first degree murder conviction?

A. We did.

Q. However, I would assume that any possibility [42] of the death penalty had been negated by the inter-

vening legal decisions so that the maximum penalty then was life imprisonment?

A. That is correct.

Q. And I would presume, sir, as part of your duties as the District Attorney of Clearfield County you sought that sentence?

A. Well, as I recall, after the jury returned its verdict of murder in the first degree, Judge Cherry merely instructed them that they must return as the penalty portion of their duties a sentence of life imprisonment.

Q. And you remained on the case as the District Attorney following the second conviction?

A. Yes, sir.

Q. And its successful litigation through affirmance by the Supreme Court of Pennsylvania?

A. That is correct.

Q. And no applications for certiorari was then taken on anyone's behalf to the Supreme Court of the United States?

A. Certainly not on behalf of the Commonwealth. I don't recall any being filed on behalf of the defense.

Q. Following the conviction and sentencing of Mr. Yount after the second 1970 conviction, sir, did you have occasion to oppose his release from state custody through [43] parole?

A. Yes, sir.

Q. And did you not do so on a number of occasions?

A. I have done so on every occasion, to the best of my knowledge, that he has applied.

MR. SCHUMACHER: No more questions.

THE COURT: Mr. Bell?

MR. BELL: Nothing further.

THE COURT: Thank you, Judge.

(The witness stepped down.)

MR. BELL: Your Honor, the Commonwealth would have no further witnesses.

THE COURT: Mr. Schumacher, do you plan to call any further witnesses?

MR. SCHUMACHER: Yes, your Honor.

THE COURT: How about a five-minute recess?

(Court was thereupon recessed at 11:35 a.m. and resumed at 11:43 a.m.)

THE COURT: Mr. Schumacher, do you want to proceed, please.

MR. SCHUMACHER: Thank you, your Honor.

Mr. Sebino.

FRANCIS V. SEBINO, being first duly sworn, testified as follows:

BY MR. SCHUMACHER:

[44] Q. Your name, sir?

A. Francis V. Sebino.

Q. Occupation?

A. Well, I am an attorney, currently not practicing general law. I am employed by the Union National Bank of Pittsburgh in the trust department.

Q. Prior to that time what was the nature of your employment?

A. I was an attorney, practicing attorney since 1960 until 1978, June of 1978 when I went to the Union National Bank of Pittsburgh.

Q. With whom?

A. I practiced during the vast majority of my career with Homer W. King and some other lawyers in the same office.

Q. Would you place your educational background and the courts to which you have been admitted on the record, please?

A. Well, I attended the University of Pittsburgh undergraduate school from 1953 to 1957, attended Dickinson School of Law from 1957 to 1960, graduated from Dickinson, passed the bar examination in July of 1960. I was admitted to practice in about in the fall or early winter of 1960 and except for six months tour of duty in the army from January of 1961 to July of 1961, I practiced law actively to 1978.

[45] Q. For the interest of the situation, was one of your classmates at Dickinson Judge Reilly?

A. He certainly was. A very good friend of mine.

Q. Have you been admitted to practice to the Pennsylvania courts?

A. I was admitted to practice in all the Allegheny County courts, the Federal District Court for the Western District of Pennsylvania, the Pennsylvania Superior and Supreme Courts and the United States Supreme Court.

Q. What if any was your relation with John Yount during the period of time in 1960's and 70's?

A. I was one of the attorneys who worked with Mr. King in the defense of Mr. Yount from April of 1966 through 1970 when the case was tried a second time and

went to the Supreme Court a second time following the second conviction.

Q. Were you in court with Mr. King on each day of the trial of the two cases?

A. Yes.

Q. And did that include post-trial and pre-trial matters?

A. I would say yes. There may have been one occasion on a pre-trial motion of some type during the first or second trial when I did not go to Clearfield, but basically I was with Mr. Yount on almost every occasion when [46] we had both pre-trial and post-trial motions and certainly on every occasion during the actual trials of the case.

Q. And did your representation of Mr. Yount include pressing for a change of venue at any time?

A. Yes, sir.

Q. And was that in connection with only the second trial or also the first trial, if you recall?

A. I believe we asked for a change of venue in both trials.

Q. What was the reason?

A. Well, we did not feel Mr. Yount could get a fair trial in Clearfield County.

Q. Why?

A. Well, we felt that the feeling was such in Clearfield County that we felt that the publicity and the high degree of feeling that we sensed, both from, you know, from speaking with Mr. Yount's relatives, Mr. Yount, from the publicity that we read and so forth, just the nature of the case, we did not feel Mr. Yount could ever get a fair trial.

Q. Did that opinion decrease after the first conviction?

A. No, sir.

Q. It remained the same or increased?

A. I frankly, well, I would say, I can't say it [47] increased or decreased, but we always felt and I always felt very strongly through both trials that Mr. Yount, that we could never impanel a jury of people who could give him a fair trial.

Q. And was—

A. I still feel that way. I still don't feel—it is my own personal opinion if Mr. Yount were tried today that the feeling would be such that he could never get a fair trial in Clearfield, but of course then I may be a little biased.

Q. What do you base that on, sir?

A. Just the nature of the case. Clearfield County, although it is large in area, I believe it was relatively small in population. It was, it is not like Allegheny County where crimes are rampant. This crime, this case was significant, in our opinion. Clearfield County was a high degree of feeling. The fact there was a rape charge in connection with the murder charge and the fact it involved a schoolteacher and a homicide with respect to one of his students, I just didn't think that the county was such that it could handle a case of that magnitude without their being significant feeling in that county.

Q. How was that feeling reflected in court attendance at the court trial?

A. Well, my recollection of the first trial was [48] that the courtroom was filled to capacity at almost all times during the trial.

Q. Do you recall any incident when the courtroom doors were open and people or spectators were standing in the hallway outside the courtroom?

A. Well, I would have to say that I did perhaps see that, but I couldn't swear to that. I think that there were times when the doors were open and there were people standing in the back, but that is something that I can't really, in my mind right now I can't visualize and say yes that happened. It is just my general feeling that there were occasions when that was so.

Q. Do you recall any incidents where there were groups of people outside the courthouse?

A. You mean waiting to get in or awaiting—I am not sure.

Q. Do you recall ever having to go through a crowd of people in order to get in the courthouse?

A. From the outside in to the courthouse?

Q. Yes, sir.

A. Not specifically, no. I don't recall. I don't say that didn't happen, but I don't have any specific recollection.

Q. Do you recall any gathering of spectators outside the courtroom following the first conviction?

[49] A. It seems to me that there were some people standing outside the courthouse following the verdict in the first case, but, you know, as to whether or not they were specifically waiting there in regard to this case or not or whether they just happened to be people congregated out in the street, I couldn't say that.

Q. Do you recall any conduct of the people in attendance at the first trial concerning whether or not they reacted to any rulings of the court?

A. Well, I heard your questioning of both Judge Cherry and Judge Reilly in this regard and I can't say that there were situations where people got up and applauded or gave a Bronx cheer specifically, but I do recall certainly an under-current, in other words, a favorable ruling, an unfavorable ruling perhaps being met with a gasp or a kind of of—I don't know exactly how to describe what I am saying. A kind of a certain feeling of agreement in regard to a favorable ruling and a certain gasp, perhaps, in respect to an unfavorable ruling so far as the Commonwealth was concerned, but I don't recall a specific situation where people, you know, got up and cheered or anything of that nature. The courtroom had more decorum than that, but I have a certain feeling that the under-current that the audience would basically react favorably to a ruling that was in favor of the Commonwealth and unfavorably insofar as [50] a ruling that was unfavorable to the Commonwealth.

Q. Do you recall the number of days that the first trial took?

A. I think the first trial took the better part of two weeks. I think we started on a Tuesday or Wednesday and I think it ended up on a Friday of the second week or something of that nature. It only took us a day or so in the first trial to impanel a jury. It took us two weeks in the second trial.

Q. In the first trial, would you again repeat whether or not the courtroom was filled, empty, half full?

A. I would say my recollection is almost every day during the first trial the courtroom was filled to capacity.

Q. Would that have only been the later part of the day or would it have been throughout the day?

A. My recollection is it was all day. My recollection is that the courtroom was crowded even by the time counsel reached the counsel table in the first trial.

Q. Do you recall whether or not the Court did anything to instruct or control the people in attendance?

A. Well, the judge set certain guidelines and so forth as far as the courthouse itself was concerned, you could only go up certain steps. Counsel were allowed up what we called the back steps and members of the [51] Pennsylvania state police, the Commonwealth and defense witnesses could go up what was referred to as the back steps and courthouse personnel, but all people who were in attendance had to go up through another way in to the courtroom. There were two ways in to the courtroom. There was a back way and there was a way that most people would come in, and the audience in effect had to come through the main door and only people who were connected with the case could come up the back steps and come up the back way in to the courtroom, and this was pretty generally enforced by the Court. The Court had deputies there and so forth to assure that people other than court personnel did not come up that way.

Q. Do you recall any incidents concerning the matter of safety to your client?

A. The only thing I recall specifically, well, the Court stationed members of the state police who were also witnesses in the case, had them sit right behind the counsel table in the first row of the audience. Some of them sat over where the Court indicated the members of the press would sit, other witnesses would sit. That was to the right of where the counsel sat, to the left of the bench, and then the Court asked certain members of the state police

to station themselves in the first row of the audience, and [52] I remember prior to the first trial the Court indicated to us that there had been some high feeling in the case and that the Court had taken precautions to protect everyone, but he advised counsel to be alert, and that was a little disconcerting to me. As a matter of fact, I remember Mr. King making the point that he would prefer, that the members of the state police instead of facing the bench, would they please face the audience because he didn't think that the state police looking toward the bench was going to help us too much if somebody got very energetic and tried anything.

Q. Do you recall, without trying to be too leading, any specific threat to Mr. Yount during either trial?

A. I personally was not made aware of any specific threat to Mr. Yount during either trial.

Q. Do you remember the courtroom being closed during either trial?

A. No, except, during the actual trial of the case?

Q. Yes.

A. No, I don't recall the courtroom being closed to the public particularly, no.

Q. Do you remember the courtroom being closed during the voir dire of either trial?

[53] A. I believe it was closed during the voir dire of the trial, but I was not aware as to how that was imposed or who was actually in there, because it seems to me that there were people who were in the audience during voir dire, but I don't recall whether they were just members of the general public, whether they were other jurors who were not involved in the selection for that particular case or whether they were just court personnel, but

it seems to me there were other people in court during voir dire, and I don't know whether or not specifically the courtroom was closed to others.

Q. Which voir dire?

A. The second trial.

Q. Getting on to the second trial, you continued to press the motion for change of venue?

A. Yes, sir.

Q. And unsuccessfully?

A. Right.

Q. And do you recall whether or not that motion was repeated during the course of voir dire?

A. Almost daily, I would think.

Q. Do you recall any incident occurring where the judge recessed the case because of problems that had developed in selection of the jury to consider the issue of a change of venue motion?

[54] A. I am not sure I follow. The time that I recall, Judge Cherry referred to the time when we made a motion to challenge the array, that was after we exhausted the first panel. I am not sure whether there had been a second panel, but either after the first panel of jurors were exhausted or after the first and some others were exhausted, we challenged the array when we somehow discovered that the jury, the prospective jurors had not been gathered at random but had apparently been gathered almost on a selective basis, and I say selective in that when we put a witness on voir dire and Mr. King asked him how did you come to be here today, the witness, the prospective juror said he had been approached to find out if he was available to serve and if he would serve on the jury and he had agreed and so forth, and on that theory we chal-

lenged the array and Judge Cherry granted that motion and threw out that whole bunch of jurors.

Q. Then further panels were selected?

A. That is right.

Q. There was a period of time where a number of successful challenges were made to individual jurors, is that correct?

A. Oh, sure.

Q. Do you recall then whether or not a recess occurred to consider a change of venue issue?

[55] A. Well, unlike Judge Cherry's opinion or recollection, I have another specific recollection of about his action in that regard. It is my recollection that at one point when we had gone through a great number of jurors and had not yet impaneled a jury that Judge Cherry said at one point that if we did not impanel a jury by the time we had exhausted the particular panel that we were on that he was going to grant a change of venue. Now, Judge Cherry says, one, he doesn't either recall that or that did not happen. My recollection is that that did happen. As a matter of fact, it was my recollection that this was almost initiated by Judge Cherry himself. In other words, even though we were making daily motions for a change of venue, that the judge himself said at one point that "if we don't get a panel at the end, if we don't get a jury at the end of this panel, I think I am going to grant a change of venue," but when we got to the end of that panel and had acquired now a few more jurors and had gotten to the point where now we had almost a complete panel, nine or ten or something of that nature, he changed his mind, and he decided then he wasn't going to do that, and then sent

out for some more jurors, and by that point we had exhausted just about all of the preemptory challenges that we had and the last couple of jurors were seated I think without benefit of our having any preemptory challenges left.

[56] Q. Did the use of those preemptory challenges have anything to do with the statement that had been made by Judge Cherry?

A. My recollection is that it did. It may have been poor strategy on our part in retrospect, but my recollection is that based on the theory that the judge was going to grant a change of venue if we didn't get a jury impaneled by the time we had exhausted that particular panel that we then used the balance of the preemptory challenges that we had in effect to get through that panel without impaneling a jury because we felt strongly enough about the case that a change of venue was necessary that at that point we were willing to do just about anything to get the venue changed.

Q. And why at that point was the change of venue so necessary?

A. Again because we just simply felt in our minds that Mr. Yount could not get a fair trial, and of course Mr. Yount himself participated in those decisions and from the standpoint we would talk with him daily and I felt that John himself felt that he could not get a fair trial.

Q. Where?

A. In Clearfield County, and therefore we felt that it was in his best interest and in effect also acceding to his wishes that we try at all costs to get the venue [57] changed.

Q. And had you conveyed to Mr. Yount any information concerning the statement of Judge Cherry?

A. Well, we would have—I can't specifically remember that point, but I am sure that we would have told him anything that had occurred in chambers that he was not a party to or did not hear. We would convey that to him so he would be aware of what was going on. We wanted him to be aware of what we knew.

Q. Was that the normal procedure you followed in representing him?

A. Yes.

Q. I direct your attention to the second trial and would ask you to instruct the Court your best recollection of the people in attendance?

A. Well, my best recollection is that certainly there were not as many people in attendance at the second trial as there had been at the first trial, but if I were to put an estimate on it, I would say that the courtroom was perhaps at least half full most of the time, but that is again just my best recollection now. I have no notes or any specific recollection as to how many people were there every day, but it is just my feeling that there was, the trial was better attended than Judge Cherry recalls, certainly not to the extent it was at the first trial.

[58] Q. Did your representation of Mr. Yount continue after the completion of the second trial?

A. Through the Supreme Court of Pennsylvania appeal, yes, sir.

Q. And the issue raised on appeal included the denial of the motion for change of venue?

A. Yes, sir.

Q. And ultimately the Supreme Court of Pennsylvania rejected that contention?

A. That is right.

Q. And did your representation then continue through his efforts to secure release from prison through parole?

A. I personally did not participate in any of those requests for parole by Mr. Yount. I am not sure whether Mr. King did, but I did not personally participate or represent Mr. Yount at all in any of his requests for parole.

MR. SCHUMACHER: I have no further questions.

THE COURT: Mr. Bell.

MR. BELL: Just a few questions, your Honor.

Cross-Examination

BY MR. BELL.

Q. First of all with regard to the change of venue motions, would it be fair to say that the change of [59] venue motions were more prevalent during the second trial than they were at the first trial?

A. Generally speaking, I think so. I think that we did make more motions during the second trial than we did during the first trial. As I indicated earlier, the jury selection the second time took place over a two week period, whereas in the first trial it was only a day and a half or two that I recall, so there were, every day that the jury selection went on seemed to bring a new motion for change of venue, so, yes, during the second trial I think there were more motions for change of venue.

Q. Now, you indicated that you recollect that the various stairways to the courthouse were like the front

stairway that most of the spectators went in because that comes in front of the courtroom, is that correct, where most of the spectators sit?

A. Well, as I recall the courthouse, when you go in the front door we went down the long hall, past the clerk of courts office and so forth, and then at the very end of the hall there was a stairway that went up, and that was a back stairway. When you went up that way, when you got to the top of that landing there was an anteroom or a large room there off of which was the law library and there were a few benches there, and then when you went straight back along your left there was a little doorway that went right [60] to the left of the bench.

Q. It actually comes in from behind the bench?

A. That is right, and that is the entrance we would use. The spectators, and I don't know how they got there, frankly, I don't remember another stairway, but the spectators came in a doorway at the back of the courtroom, a large doorway.

Q. So if they were to come up the same stairs you came up they would actually have to come from the back of the bench and proceed from the middle of the courtroom to get their seats?

A. That is right.

Q. Do you happen to know where the jury panel courtroom is in the courthouse?

A. My recollection is that when you came up this back stairway in to the second landing there, there was a little library off to your left and there was a place, a little room just before you went in to the courtroom there where I think they kept John sometimes, and I think the room

opposite it the law library on the other side of the hall is where the jury people stayed. I am not sure.

Q. But at any rate, the jury panel's deliberation room, et cetera, is up on that second floor area back behind the courtroom, to your recollection?

A. Yes, I think so.

[61] Q. Now, you indicated at one point, and I believe this is with regard to the first trial, there were State policemen sitting out in the first row of the audience, et cetera?

A. Yes.

Q. Was that just the first trial, or did that occur at the second trial also, if you know?

A. I don't recall that. I do recall it in the first trial. I don't specifically recall it in the second trial.

Q. Now, you did indicate that you have a recollection of Judge Cherry making a statement with regard to the exhaustion of this one panel they were on and if it was exhausted without a jury being seated that he would grant the change of venue motion?

A. That is my recollection.

Q. Do you have any recollection as to whether that was done in the courtroom, on the record, or where?

A. I think it was done in chambers. I think at one point Judge Cherry in effect said from the bench during voir dire, "I want to see counsel in chambers following this voir dire," I don't know if it was following a particular witness, or during a lunch break, but I think he said from the bench, "I want to see counsel in chambers, and we went in chambers, and that is my recollection where he [62] made the statement.

Q. The change of venue motion was asserted on appeal?

A. Yes.

Q. Was that particular indication, Judge Cherry had made that and that you had used up those pre-emptory challenges, was that ever asserted during those appeals?

A. I don't recall that.

MR. BELL: I have no further questions.

THE COURT: Mr. Sebino, I am just curious as to your comment that the first jury selection proceeded so much more rapidly than the second and how do you account for that in view of the fact that there was apparently so much more publicity attendant to the first trial?

A. I have been sitting here wondering that same thing. I don't know the answer to that question as to why the jury selection proceeded so much quicker the first time. I think that probably it was because as a result of the first trial and the publicity that the trial itself had obtained that if anything, we may have even felt more strongly the second time that the change of venue was necessary than perhaps we did even the first time, and we started to ask questions of every juror, "Have you formed an opinion? Did you read about the first trial? Do you know anything about the case?" In addition to asking them if they [63] knew anything about the incident, my recollection is we would ask them had they read about the first trial and formed any opinion and so forth. The only answer I can give at this point to that question is that we felt more strongly about it even the second time than we did the first time and also because of the fact the first

trial had taken place, we felt that that maybe it was even more difficult at that point because of the publicity that had occurred with respect to the trial itself and the fact the man had been convicted once there, you know, there had been a verdict of guilty returned and I think we felt that it would be much more difficult for the people of the community to now sit on that jury and find him not guilty in light of the fact that he had been convicted already there.

THE COURT: Mr. Schumacher.

BY MR. SCHUMACHER:

Q. Did the fact that the first jury had heard the entire confession have anything to do with it?

MR. BELL: Objection, your Honor. That is leading.

THE COURT: Mr. Schumacher, would you rephrase your question?

BY MR. SCHUMACHER:

Q. As a part of your trial strategy in requesting a change of venue, what factors were taken in to [64] consideration, if any, concerning evidence that was admitted at the first trial?

A. Well, certainly as I said in response to the Court's question, the first trial and the fact that the evidence that had been adduced at the first trial had been made public, including, obviously, a confession in the first trial which was admitted in to the first trial but which was kept out of the second trial, whether that aspect of the confession specifically caused us to want a change of venue, I can't say. All I am saying is that the fact that the evidence had all

come out and the man had been convicted, I think that led us to believe that if anything, it was going to be harder than ever to get a fair trial the second time around.

Q. What was the defense at the first trial?

A. The defense at the first trial was temporary insanity.

Q. Did Mr. Yount testify?

A. Yes.

Q. Did the nature of the defense and the fact of his testimony have any bearing on your increased efforts to secure a change of venue at the second trial?

A. Well, the only thing I can say is I think I have answered that generally that all of the evidence that came out in the first trial, obviously, and had been made [65] public we felt that the people now were aware of this whole situation and that anybody that hadn't heard about the case the first time around certainly must have heard about it by now and formed an opinion.

MR. SCHUMACHER: I have nothing further.

THE COURT: Mr. Bell.

MR. BELL: Just one brief area.

BY MR. BELL:

Q. With regard to the jury selection at the second trial, several panels or several groups of people had to be brought in for jury selection, is that correct?

A. Yes, sir.

Q. At any point was the jury selection delayed while they had to go out and obtain those people? Could that be the reason it took longer to select the jury for the second trial?

A. They did go out and get some more people, but my recollection is that did not delay the voir dire more than a half a day at the most. It seems to me that occurred over a weekend. It seems to me as a matter of fact this panel that the array was challenged I think was acquired over a weekend and it was the following Monday that array was challenged, and then they had to go get some more people, but I don't think it delayed the trial, the voir dire more than half a day or a day at the most.

[66] MR. BELL: I have no further questions.

THE COURT: Mr. Schumacher, do you have anything further?

MR. SCHUMACHER: I have nothing further.

THE COURT: Thank you.

MR. SCHUMACHER: I would like to thank Mr. Sebino for interrupting his vacation to come here under subpoena to testify.

THE COURT: Do you have any further witnesses?

MR. SCHUMACHER: I have no further witnesses, your Honor, and I would ask that a specific ruling be made by the Court that the testimony is closed for two reasons. One is that my client might be held at Western State Penitentiary pending any further proceeding because I don't want to bring him back a third time, and he has asked me to ask you to enter an order to that effect if you would be willing to do so, I could draft one.

THE COURT: Mr. Bell.

MR. BELL: Your Honor, on behalf of the Commonwealth, we have no further testimony we can perceive being placed on the records so we would have no objection to closing the record.

THE COURT: Then the marshals, I am not sure how we are doing the transportation, but Mr. Yount will be taken back to Western and I assume Western is responsible [67] for transporting him?

THE DEFENDANT: Your Honor, all I was requesting was that somehow the state correctional institution personnel be notified there is no further need for me to stay there and otherwise they may hold me there.

THE COURT: Can the marshals let them know he is now free to return to Camp Hill?

THE DEFENDANT: Thank you.

THE COURT: Now we have a briefing schedule. Are we able to adhere to that schedule?

MR. SCHUMACHER: I hope we can. My brief is finished and I hope to file it today. When I say my brief, I am plagiarizing Mr. Yount who essentially wrote it. We met at Camp Hill about two weeks ago. I went over everything with him and I have made some changes. Our brief will be submitted hopefully today. I have a number of exhibits to attach to it, so whatever additional briefing is necessitated by the new evidence today will be included in any reply brief that I would file, and I would prefer to adhere to the original briefing schedule.

THE COURT: And the Commonwealth I believe had until the end of January or first of February.

MR. BELL: February first.

THE COURT: Will you be able to adhere to that?

[68] MR. BELL: Yes.

THE COURT: As I previously indicated, I have already read the voir dire myself because I don't want to delay further than has to be. If the Commonwealth will get its brief in by the first of February and if there are no reply briefs, would you let me know in writing there will be no reply briefs and I can't see any reason we can't dispose of this by say mid-February. I have already drafted a factual background and my notes from the reading of the voir dire.

O.K. Is there anything further?

MR. SCHUMACHER: Nothing further.

MR. BELL: No, sir.

THE COURT: Then we will thank everybody for coming in and we will wait to receive your briefs.

(The proceedings were thereupon concluded at 12:20 p.m.)

Reporter's Certification

I hereby certify that the foregoing is a true and complete transcript of the proceedings held in the aforementioned action held on December 28, 1981 before Robert Mitchell, United States Magistrate.

(s) Marvin D. Cutright
Marvin D. Cutright
1031 Post Office Building
Pittsburgh, Pa. 15219

MAGISTRATE'S REPORT AND RECOMMENDATION

[Caption Omitted]

I. *Recommendation*

It is recommended that the petition of Jon E. Yount for a writ of habeas corpus be granted and that he be discharged from custody unless, within sixty (60) days, the Commonwealth retries him under circumstances that will assure a fair and impartial jury.

II. *Report*

Jon E. Yount has presented a petition for a writ of habeas corpus which he has been granted leave to prosecute in forma pauperis.¹

Yount is presently incarcerated at the State Correctional Institution at Camp Hill serving a life sentence, following his conviction, by a jury of first degree murder at No. 2, May Sessions, 1966, in the Court of Common Pleas of Clearfield County, Pennsylvania. This sentence was imposed on March 26, 1973.

The petitioner was originally tried and convicted of first degree murder and rape and sentenced to life imprisonment. The judgment of sentence was appealed

¹ The petition was originally filed in the United States District Court for the Middle District of Pennsylvania and transferred to this Court pursuant to the provisions of section 2241(d) of Title 28, United States Code.

to the Supreme Court of Pennsylvania, which Court reversed the conviction and remanded for a new trial in view of the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Commonwealth v. Yount*, 435 Pa. 276 (1969), certiorari denied, 397 U.S. 925 (1970).

After the denial of a request for a change of venue, jury selection commenced on November 4, 1970 and was completed on November 16, 1970. Testimony began on November 17, 1970 and on November 20, 1970, the petitioner was again convicted of first degree murder.² The jury again fixed the sentence at life imprisonment, and formal sentence was imposed on March 26, 1973. On appeal, the judgment of sentence was affirmed. *Commonwealth v. Yount*, 455 Pa. 303 (1974).

In his direct appeal to the Supreme Court,³ the petitioner presented the following questions as his bases for relief:

1. Did the lower court err in refusing to order a change of venue in the within case?
2. Did the lower court err in certain of its rulings on challenges for cause made by the defendant during the voir dire?

² On retrial, the petitioner was not charged with rape. At the evidentiary hearing held on December 28, 1981, the former Clearfield prosecutor testified that the determination to dismiss the rape charge on retrial was a prosecutorial decision based on the prior determination of the Pennsylvania Supreme Court excluding certain evidence.

³ See: Brief for appellant filed in the Supreme Court of Pennsylvania.

3. Did the lower court err in refusing to suppress all alleged oral admissions made to the police by the defendant after defendant indicated that he was the man the police were seeking in connection with the Luthersburg incident?

4. Did the lower court err in refusing to suppress all evidence pertaining to the defendant's station wagon automobile?

5. Did the lower court err in admitting into evidence a pocketknife of the defendant?

6. Did the lower court err in admitting into evidence inflammatory photographs of the deceased and articles of clothing worn by the victim at the time of the alleged homicide?

7. Did the lower court err in refusing defendant's motion for the sequestration of the Commonwealth's witnesses?

8. Did the lower court err in refusing to grant the defendant's points for charge, and particularly those pertaining to the Commonwealth's failure to produce sufficient evidence of a willful, deliberate and premeditated homicide, and failure to prove any deadly weapon in connection with said homicide?

9. Did the lower court err in its instructions to the jury, and particularly in placing undue emphasis on the law governing or concerning murder in the first degree, and failing to adequately cover second degree murder, and in over emphasizing its opinion that the circumstances could not warrant a jury verdict of voluntary manslaughter?

10. Did the lower court err in failing to grant defendant's motion for a mistrial based on inflammatory and prejudicial remarks made by the District Attorney during his closing address to the jury and on the District Attorney's unwarranted speculations to the jury on how the homicide occurred, which speculations were not based on any facts or reasonable inferences from the evidence adduced at trial?

11. Was the verdict in this case contrary to the evidence produced at trial, and contrary to the law applicable to the evidence?

In support of the present petition, Yount alleges that he is entitled to relief for the following reasons:⁴

1. Petitioner's conviction was obtained by a violation of his privilege against self-incrimination through the use of oral statements elicited without required *Miranda* warnings.

2. Petitioner's conviction was obtained in violation of his constitutional right to select and empanel a fair, impartial and "indifferent" petit jury.

3. Petitioner's conviction was obtained in violation of his constitutional right to a fair and impartial trial as a result of the trial court's prejudicial charge to the jury and included erroneous instructions.

⁴ See: Original petition for a writ of habeas corpus filed by Yount in the United States District Court for the Middle District of Pennsylvania, and subsequently transferred to this Court.

After an answer to the petition was filed, counsel was appointed to represent Yount and a status conference held. Following that conference, counsel for the petitioner was granted leave to file an amended petition and the Commonwealth was granted time to reply. In the amended petition, counsel added an allegation that Yount was denied the effective assistance of counsel generally and specifically in that counsel did not adequately prepare supports for the change of venue motion; failed to prepare for and conduct an adequate voir dire; failed to have all proceedings recorded; failed to secure sequestration of witnesses; failed to seek recusal of the trial judge, and failed to meet the standards of adequacy of representation.⁵ The matter was then scheduled for an evidentiary hearing.

It is provided in 28 U.S.C. §2254(b) that:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

This statute reflects a codification of the well-established concept which requires that before a federal court will review any allegations raised by a

⁵ See: Amendment to petition for writ of habeas corpus, filed on July 1, 1981.

state prisoner, those allegations must first be presented to that state's highest court for consideration. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Brown v. Cuyler*, F.2d (3d Cir. No. 81-1968, filed January 29, 1982).

It is only when a petitioner has demonstrated that the available corrective process would be ineffective or futile that the exhaustion requirement will not be imposed. *Preiser v. Rodriguez*, *supra*.; *Hallowell v. Keve*, 555 F.2d 103 (3d Cir. 1977).

In the instant case, the issues which the petitioner raised in his original petition for a writ of habeas corpus were raised in his direct appeal to the Pennsylvania Supreme Court and are properly before this Court. However, the issues which counsel seeks to raise in the amended petition were not presented to the courts of the Commonwealth for their initial consideration, and will not be considered here.⁶ *Tippett v. Roberts*, 587 F.2d 373 (8th Cir. 1978).

To place matters in proper perspective, the facts of the case are adopted here from the opinion of the Pennsylvania Supreme Court, 455 Pa. at pp. 306-308.

⁶ It should be observed that the issues which counsel has presented specifically raise the issues in the context of the lack of the effective assistance of counsel. Since, as postured, these issues have not been considered by the Pennsylvania courts, they will not be considered in the federal proceeding. However, it should be observed that the core of the issues which counsel seeks to raise, concern the substantive issues which the plaintiff has raised, and which are properly before this Court, and as presented by the plaintiff, the issues will be considered here.

"On April 28, 1966, the body of Pamela Sue Rimer, an eighteen year-old high school student, was discovered in a wooded area near her home in Luthersburg, Pennsylvania. One of her stockings was knotted and tied around her neck. An autopsy revealed that death was caused by strangulation. Further examination disclosed three slashes across the victim's throat and cuts of the fingers of her left hand, inflicted by a sharp instrument, and numerous wounds about her head, caused by a blunt instrument.

"At approximately 5:45 a.m. on the morning of April 29, 1966, appellant, a teacher at the school the deceased had attended, voluntarily appeared at the state police substation in DuBois, Pennsylvania, and rang the doorbell. An officer opened the door and asked whether he could be of assistance. Appellant stated 'I am the man you are looking for.' The officer asked whether he was referring to the 'incident in Luthersburg,' and appellant responded in the affirmative.

"The officer then asked appellant to come into the police station and be seated. Leaving appellant unattended, the officer proceeded to a back bedroom where a detective and another police officer were sleeping, woke them, and informed them that 'there was a man in the front that said we are looking for him.' He then returned to the front office where appellant, who had removed his coat, hat, and gloves, identified himself as Jon Yount.

"After dressing, the detective and the second officer entered the front office. The detective was

told by the first officer that appellant's name was Jon Yount. The detective then asked appellant to be seated inside a smaller office adjacent to the front office, where he asked, 'Why are we looking for you?' Appellant replied, 'I killed that girl.' Upon hearing that answer, the detective inquired, 'What girl', and appellant responded, 'Pamela Rimer.'

"In response to the detective's next question, 'How did you kill this girl?' appellant answered 'I hit her with a wrench and I choked her.' At that point the detective gave appellant admittedly inadequate *Miranda* warnings, and began interrogation as to the details of the crime. A written confession was subsequently obtained.

"Prior to appellant's second trial, the question 'How did you kill this girl?' and its answer, as well as the written confession were suppressed, on the authority of our prior decision, as violative of *Miranda*. The admissibility of appellant's initial statements that the police were looking for him in connection with the Luthersburg incident is not challenged, nor could a challenge be successful. See *Commonwealth v. Miller*, 448 Pa. 114, 121 n.2, 290 A.2d 62, 65 n.2 (1972)."

The petitioner's first contention in support of his claim for habeas corpus relief, is that it was error for the court to permit certain evidence to be heard by the jury. Specifically, he challenges the testimony of State Troopers which related that in the early morning hours of April 29, 1966, the petitioner appeared at the DuBois state police substation and rang the doorbell

(R. 250);⁷ that when Trooper Philips answered the bell, the petitioner stated that he was the man they were looking for in conjunction with the Luthersburg incident (R. 250, 251, 256); that Trooper Philips then called other officers into the front room who inquired why they were looking for him and that the petitioner replied that they were seeking him in conjunction with the killing of Pamela Rimer (R. 253, 256-257, 263, 265, 271). Following this revelation, the petitioner was apprised of his *Miranda*⁸ rights in a manner which the Pennsylvania Supreme Court found defective, and accordingly ordered the remaining evidence suppressed.⁹

That is, what the petitioner now alleges as improperly admitted at trial, are the statements he initially made to the State Police when he arrived at their barracks and identified himself as the individual they were seeking.

In *Miranda v. Arizona*, *supra.*, the Court held:

"Confessions remain a proper element in law enforcement... The fundamental import of the privilege ... is not whether [an individual] is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that the police stop a person who enters a police station and states that he wishes to confess to a crime ... Volunteered statements of any kind are not barred by the Fifth Amendment... 384 U.S. at 478.

⁷ All references to the trial transcript are marked "R".

⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁹ See: *Commonwealth v. Yount*, 435 Pa. 276 (1969).

The Court further observed:

"any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S. at 478.

Thus, it must be determined at what point the police became obliged to inform the petitioner of his rights.

In *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980) the Court held,

"... the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police."

Thus, *Miranda* is applicable only to custodial interrogations involving matters other than those "normally attendant to arrest and custody".

In *United States v. Mesa*, 638 F.2d 582, 584-585, (3d Cir. 1980), Chief Judge Seitz wrote:

"*Miranda* warnings are designed to protect against the evils of 'custodial interrogation', and they are not intended to unduly interfere with a

proper system of law enforcement or to hamper the police's traditional investigatory functions ... Therefore, the warnings need be given only 'when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning,'... Since *Miranda*, the Court has indicated that to determine whether there has been a 'custodial interrogation,' a court must make two discrete inquiries. First, it must determine whether the suspect was in 'custody'.... If the suspect was in 'custody', the court then must decide whether the police interrogated him."

While perhaps not directly on point, but rather similar in circumstances is *United States v. Lam Lek Chong*, 544 F.2d 58, 70 (2d Cir. 1976) in which after being charged with a crime, Chong initiated a series of meetings with a government agent to further his previously expressed desire to cooperate. The Court there held,

"he freely volunteered the statement at one of a series of meetings which he initiated, and at which he had expressed no desire to have counsel. The government was thus free to make use of the statement at trial."

Or, one might consider the similarity to *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) where the defendant voluntarily came to the police station in response to a request from the police, but was informed that he was not under arrest. In that case, the Court held:

"Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment'. Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody'. It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited."

As applied to the instant facts, it would appear that in the early morning hours of April 29, 1966, the petitioner voluntarily appeared at the police station and related that he believed the police were seeking him. At that juncture, it was only reasonable for the police to inquire as to why the petitioner believed they were seeking him. Only after it became apparent that what the petitioner had related was of moment to the police, did the petitioner's presence become custodial and the *Miranda* warnings become mandated. That is, until such time as the police recognized that the peti-

tioner was present to confess his participation in a crime, did his presence become custodial and warrant the advice of rights as mandated by *Miranda*. On this basis, the petitioner's communication that the police were seeking him in conjunction with the murder of Pamela Sue Rimer was properly admitted.

Another issue which the petitioner raises here is that he was denied a fair trial as a result of the court's prejudicial and erroneous jury instructions. Specifically, the petitioner contends that the trial court unduly emphasized first degree murder rather than murder in general and the penalty which was permissible for first degree murder; that the court charged that malice may be presumed from the use of a weapon against a vital part of a person's body; that evidence of a person's good character can only be weighed in considering guilt or innocence and thereby implying it could not be considered as to state of mind; that the court instructed the jury that there was no basis for a voluntary manslaughter verdict as the petitioner had argued and upon which he based his defense, and that the court acted improperly in stating that it had affirmed all points for charge submitted by the Commonwealth, but had rejected those submitted by the petitioner.

As presented to the Supreme Court of Pennsylvania, the issue was:

"The trial court erred in refusing to grant the defendant's points for charge and particularly those pertaining to the Commonwealth's failure to prove a deadly weapon in connection with said homicide or to produce sufficient evidence of a willful, deliberate and premeditated homicide.

"The trial court erred in its instructions to the jury, and particularly in placing undue emphasis on the law governing or concerning murder in the first degree, and failing to adequately cover second degree murder; and in over-emphasizing its opinion to the effect that the circumstances of the case could not warrant a jury verdict of voluntary manslaughter."¹⁰

In reviewing jury instructions, those instructions must be considered as an entity and no undue attention focused on any particular aspects of those instructions. *Henderson v. Kibbe*, 431 U.S. 145 (1977); *Cupp v. Naughten*, 414 U.S. 141 (1973); *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981) cert. denied U.S. (1982).

During its charge to the jury, the court delivered preliminary instructions and then read the definition of murder (R. 423-424, 436). First the jury was specifically instructed as to the elements of first degree murder, and then informed, as the statute then mandated, that all other murder shall be murder in the second degree (R. 426, 436). The court then instructed that under the circumstances voluntary manslaughter was not a permissible verdict (R. 426, 436). However, the court quickly corrected this error and stated that although in the opinion of the court there was no showing of voluntary manslaughter, the opinion of the court was not binding on the jury and that the jury could return a voluntary manslaughter verdict (R. 428,

¹⁰ See: Page 53-62 of brief for petitioner-appellant filed in the Supreme Court of Pennsylvania at No. 357 January Term, 1973.

429, 436, 439). Voluntary manslaughter was also defined (R. 428). Thus, the court instructed on all permissible verdicts and while perhaps improperly expressing its opinion as to whether or not a verdict of voluntary manslaughter was justified, immediately corrected this error and stated that it was within the province of the jury to reach such a verdict.

When viewed as an entity, it cannot be said that the jury instructions were so prejudicial as to deny the petitioner a fair trial.

The petitioner also objects to the failure of the trial court to instruct the jury as requested. This issue, as presented to the Pennsylvania Supreme Court challenged the trial court's denial of a requested instruction,

"The Commonwealth has failed to prove any deadly weapon which bears any connection with the death of Pamela Sue Rimer."¹¹

The evidence produced at trial disclosed that the victim died as a result of cuts to the neck, aspiration of blood, and skull and brain injuries (R. 234). There is no attempt on the part of the Commonwealth to prove death by any specific instrumentality. Thus, such an instruction was not required. *Bishop v. Mazurkiewicz*, 634 F.2d 724 (3d Cir. 1980), cert. denied 101 S.Ct. 3053 (1981).

The final issue which the petitioner seeks to raise here is whether or not his right to a fair, impartial and "indifferent" jury was violated.

¹¹ See: Page 53 of brief for petitioner-appellant filed in the Pennsylvania Supreme Court.

Jury selection commenced on November 4, 1970 for the purpose of seating twelve jurors and two alternates. The selection process fills over eleven hundred pages of transcript, and was not completed until November 16, 1970 after 168 persons were voir dired. We have carefully studied the voir dire examination and from that study have reached several conclusions.

The parties have stipulated that in 1970, Clearfield County had a population of 74,619, and that there were two newspapers in general circulation within the county.¹² In addition, there were a very limited number of radio and television stations of local origin.

Following the homicide and the subsequent surrender of the petitioner, his confession and ultimate trial and conviction were given extensive coverage by the news media. When an attempt was made to impanel a jury for the second trial, almost without exception the veniremen stated that four years previously, when the original trial was held, they had read about it extensively in the newspapers and heard detailed reports on the radio and television. Almost all of these people had also heard discussions of the case, and heard people express their opinions concerning the case, and in many cases had expressed their own opinions.

Of the one hundred-sixty-eight persons called, one hundred and one, or sixty percent stated that they had

¹² It was agreed that the two papers in general circulation in Clearfield County were the Clearfield Progress and the DuBois Express. The former had a circulation of 16,250 and the latter had a circulation of 9,500.

firmly fixed opinions which could not be changed regardless of what evidence was presented.¹³ Another nineteen individuals or eleven percent stated that while they had fixed opinions they would be able to change those opinions if the petitioner-defendant

¹³ Reference to the voir dire transcript are marked "T". Those individuals having fixed opinions were: Eckley (T. 12); Felix (T. 16); Kiphart (T. 50); Shiner (T. 52); Habasevich (T. 56-57); Hensal (T. 72, 74); Jay (T. 77-78); Anderson (T. 137); Youngren (T. 148); Frelin (T. 201); Clever (T. 217); Carouso (T. 221); Way (T. 223); Kolbe (T. 228); Gluczyk (T. 229); Wells (T. 232); Baer (T. 236-237); Holmes (T. 240); Jacobson (T. 242); Eshelman (T. 252); Woods (T. 254); Yeschke (T. 262); Thompson (T. 264); Spinelli (T. 268); Snyder (T. 279); Phillips (T. 281); Hoover (T. 294); Bowman (T. 302); Nordberg (T. 303); McPherson (T. 307-308); Shaw (T. 324); Shedlock (T. 326); Gorman (T. 330); Fyock (T. 335); Way (T. 340); Laman (T. 343); Cossick (T. 346-347); Evans (T. 348); Flick (T. 352); Rush (T. 354); Collins (T. 358); Riley (T. 360); Mahlon (T. 365); Solava (T. 366); DePerro (T. 437); Kuhn (T. 468, 470); Morgan (T. 482-483); Derck (T. 484); Narehood (T. 488); Decker (T. 490); Aughenbaugh (T. 493); Curry (T. 496); Cowder (T. 499); Curley (T. 504, 507); Lightner (T. 511); Lynn (T. 514); Johnson (T. 531); Frankdouser (T. 548); Benedek (T. 552); Decker (T. 554); Anderson (T. 557); Baird (T. 558-559); Schroeder (T. 588); Andrews (T. 589-590); Bish (T. 593); Larson (T. 696); Henninger (T. 699-705); Sekula (T. 708); Hall (T. 710-711); Carr (T. 730-731); Hepfer (T. 733); Sanker (T. 738-740); Morince (T. 744); Sandri (T. 783-784); McClure (T. 850); Tibbins (T. 852); Westover (T. 865); Bowman (T. 869); Challingsworth (T. 873); Rougeux (T. 884); Ruch (T. 919-920); Shaffer (T. 938); McGonigal (T. 968); Bontempo (T. 1003); Fye (T. 1016); Accordino (T. 1021); Bonsall (T. 1022-23); Turner (T. 1027-28); Hodge (T. 1031); Hudson (T. 1038); McDonald (T. 1041); Briskar (T. 1044); Ellinger (T. 1047); Heilbrun (T. 1052); Blimmel (T. 1053); Leigey (T. 1057); Henry (T. 1059); Stoyek (T. 1087); Gross (T. 1094, 1097); Turley (T. 1102), and Lender (T. 1160).

would be able to convince them to do so.¹⁴ That is, they would require affirmative testimony on the part of the defendant to convince them to change their opinion as to his guilt. Finally, two individuals stated that although they had somewhat fixed opinions, they believed they would be able to listen to the case with an open mind.¹⁵ Thus, over seventy percent of the persons called testified that they had a fixed opinion as to the petitioner-defendant's guilt although some of those persons were willing to change that opinion if they could be convinced to do so.

In *Smith v. Phillips*, U.S. (No. 80-1082, filed January 25, 1982, slip opinion at p. 8) the Court noted:

"The safeguards of juror impartiality such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a juror capable and willing to decide the case solely on the evidence before it..."

¹⁴ Those persons having fixed opinions who stated that they could change their opinion if the petitioner-defendant could convince them to do so were: Krapf (T. 39); Habasevich (T. 60-61); Pfaff (T. 79, 84); Mathews (T. 107); Turner (T. 247); Black (T. 273); Burkett (T. 380); McCall (T. 464); Carter (T. 501-502); Bernick (T. 584); Ellenberger (T. 751); Polkinghorn (T. 756-760); Swisher (T. 892); Decker (T. 897-902); Merritt (T. 975-984); Cowfer (T. 1078-1080); Ford (T. 1106-1109); Hudson (T. 1114-1115), and Chincharick (T. 1170).

¹⁵ Those persons having somewhat fixed opinions but willing to listen with an open mind were: Hren (T. 442-445) and Iraine (T. 477-478).

Thus, in this context, it must be determined whether or not the jurors were able to disregard their prior exposure and beliefs and base their verdict solely on the evidence and law presented in the courtroom.

The parties concede that there was extensive publicity at the time of the crime, when the petitioner confessed to having committed the crime, and surrounding his first trial and conviction. Apparently, the second trial which occurred about four years later was surrounded with publicity, but not to the same degree which originally occurred. Nevertheless, it does appear that at this late date, fifteen years after the crime, there is considerable public feeling in Clearfield County in opposition to the petitioner.¹⁶

In *Martin v. Warden*, *supra* at p. 805 the Court held:

"A state court conviction may be overturned in a habeas proceeding only where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial."

¹⁶ We note that at the federal evidentiary hearing testimony was presented which indicated that whenever the petitioner applies for parole, considerable community interest is invoked in opposition to the granting of his petition. Specifically, petitions are circulated at local shopping malls, and newspaper articles appear in opposition to the parole. In addition, when the evidentiary hearing was scheduled in this court, the local papers reported that fact, and the court received an *ex parte* communication from one local resident in opposition to granting any form of relief to Yount.

The Court in *Martin* stated further:

"Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based upon the evidence presented at trial." 653 F.2d at 804.

That is, in reviewing a state court proceeding in a federal habeas corpus action, the federal court is limited to a determination of whether or not the veniremen were so tainted as to render it impossible for a defendant to receive a fair trial.¹⁷

The record in this case discloses that essentially all members of the venire had been exposed to publicity concerning the murder and trial of the petitioner. In addition, most conceded that they had heard individuals express opinions concerning the petitioner's guilt. Nevertheless, in our contemporary society, it would appear unlikely that any adult individual living in a small rural community could have avoided exposure to a sensational murder occurring within that society. Nevertheless, exposure is not the test of prejudice, rather it must be determined whether those individuals who were called to serve on the jury were

¹⁷ The federal standard in reviewing a state court conviction is different from that utilized in determining the propriety of a federal conviction. In the latter instance, the appellate courts may in the exercise of their supervisory power, presume a high potential for prejudice and order a new trial. However, when reviewing a state court proceeding, the demonstration of prejudice must be of constitutional magnitude. *Martin v. Warden*, *supra* at pp. 804-805.

capable of laying aside those matters which they had heard and read, and reaching a verdict based solely on the evidence and the law as presented in the trial court. *Martin v. Warden, supra*. Thus, one must examine each of the jurors who were ultimately selected in order to determine whether or not he or she could impartially and fairly judge the evidence.

Juror number 11,¹⁸ Hoover, testified that he had read about the case and heard it discussed, but that he had no opinion on the merits (R. 64-65). Juror number 28, Clapsaddle, testified that she had read and heard about the case; that she had formed an opinion about the case but that opinion was not firm, and that she had discussed the case with others (R. 205-207). Juror number 68, Yorke, testified that he had moved to the community fairly recently and that he was not familiar with the case (R. 369-370). Juror number 72, Waple, testified that she had read and heard about the case, but had no opinion about it (R. 409-412). Juror number 75, Hren, testified that he was familiar with the case, had formed an opinion about the case, and was not certain he could ignore that opinion; that he would require evidence to alter that opinion, but believed that he could judge the case with an open mind (R. 440-455). Juror number 100, Karetski, testified that he was familiar with the case; that at the time of the original trial he had an opinion about that case, that at the time of the retrial he was not certain

¹⁸ The references to "juror number" refer to the order in which each member who was ultimately seated as a juror was called from the venire. That is, the number is actually the position which that individual occupied in the venire.

of the merits of that former opinion, and that he believed he did not have any opinion (R. 560-562).

The next juror seated, juror number 120, Hummel, testified that she was familiar with the case but did not have an opinion about it (R. 787-788). Juror number 122, Parks, testified that she had read about the case (R. 813). Juror number 126, Undercoffer, testified that he was familiar with the case but that he did not hold any opinion (R. 855-857). Juror number 135, Murphy, testified that he had heard and read about the case but that he had no opinion (R. 922-924). Juror number 141, Kurtz, had read about the case and had no opinion about it (R. 988-990). It should be observed that at that juncture the defense had exhausted its peremptory challenges (R. 999). However, because another already seated juror had to be excused due to a death in her family, additional challenges were granted. The twelfth juror, juror number 164, Harchak, testified that he had read about the case occasionally but had not formed an opinion (R. 1119-1121).

Finally, two alternates were selected, Juror number 167, Chicharick, had read about the case, and had a fixed opinion, however, he believed that if evidence was presented he could be convinced to change that opinion (R. 1165-1170). Juror number 168, Pyott, testified that she had read and heard about the case; that she had an opinion but that if proper evidence was presented she could change that opinion (R. 1179-1181). Again, at that juncture, the defense had exhausted its peremptory challenges.

In an effort to demonstrate that the prejudice which had infected the community was more wide-

spread than the voir dire demonstrated, at the federal hearing, Constance Ives was called to testify. Mrs. Ives testified that her father-in-law had been called as part of the venire and although he had privately expressed a negative opinion about the petitioner, when called upon and examined in voir dire, he testified that he had no fixed opinion (R. 807). However, Mr. Ives was not seated as a juror.

In *United States v. Wood*, 299 U.S. 123, 145-146 (1936), the Court stated:

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

In reversing the conviction in *Irvin v. Dowd*, 366 U.S. 717, 727 (1961), the Court observed,

"The [venire] panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were preemptorily challenged by the petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds... 90% of those examined on the point... entertained some opinion as to guilt...

"...the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such

an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."

When one considers the large proportion of the veniremen who when called, testified under oath that they had fixed opinions concerning the case, and couples this with the fact that several of those selected as jurors candidly admitted that they held opinions concerning the guilt of the petitioner but were willing to be convinced otherwise, a certain pall is cast upon those in the minority who testified that they had not formed a fixed opinion and could judge the case on its merits.

Thus, it would appear that where in the circumstances of this case, a sensational homicide occurs in a rural community, and the public has been fully informed of the fact that the charged defendant had confessed to the crime, and that he had been previously tried and convicted of both rape and murder, and where on retrial the confession is suppressed but the public remains very much aware of the circumstances surrounding the case and has formed definite opinions as to the guilt or innocence of the defendant, it is a violation of the defendant's Sixth Amendment rights to be subject to retrial before his community peers.

To repeat what has been previously stated,

"The safeguards of juror impartiality such as *voir dire* and protective instructions from the trial

*Magistrate's Report
Recommendation*

judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it..." *Smith v. Phillips, supra.*

Given the pervasive community knowledge of the facts of this case and the prevailing opinion as to Yount's guilt, as well as the strong community hostility towards the petitioner, it does not appear that the empanelled jury was "capable and willing to decide the case solely on the evidence before it" but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt. Under such circumstances, it does not appear that the Sixth Amendment mandate of a fair and impartial jury could have been met in the small rural community of Clearfield County.

Accordingly, it is respectfully recommended that the petition of Jon E. Yount for a writ of habeas corpus be granted and that he be discharged from custody unless, within sixty (60) days, the Commonwealth retrieves him under circumstances that will assure a fair and impartial jury.

Respectfully submitted,

(s) Robert C. Mitchell

ROBERT C. MITCHELL

February 12 1982

ORDER

[Caption Omitted]

AND NOW, this 12th day of February, 1982, the Magistrate's Report and Recommendation having been filed,

IT IS ORDERED that the parties shall have ten (10) days in which to file objections to said Report and Recommendation.

(s) Robert C. Mitchell

ROBERT C. MITCHELL

United States Magistrate

RESPONDENT'S OBJECTIONS TO MAGISTRATE'S
REPORT AND RECOMMENDATION
[Caption Omitted]

AND NOW, comes the Commonwealth of Pennsylvania by F. CORTEZ BELL, III, Esquire, Assistant District Attorney of Clearfield County, and sets forth the Respondent's objections to the Magistrate's Report and Recommendation as follows:

I. Procedural History of Case

Petitioner, Jon E. Yount, was arrested April 29, 1966, on charges of Murder and Rape filed to No. 2 May Sessions 1966 in the Court of Quarter Sessions of Clearfield County, Pennsylvania. The case proceeded to trial on September 28, 1966, and on October 7, 1966 the Petitioner was pronounced guilty by jury verdict of Murder of the first degree and Rape. Following the denial of post-trial motions, Petitioner appealed from the judgment of sentence to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania reversed the conviction and ordered a new trial on the basis of *Miranda vs. State of Arizona*, 384 U.S. 436 (1966) which had been decided in the period of time between the date of Petitioner's arrest and the date of trial. *Commonwealth vs. Yount*, 435 Pa. 276, 256 A.2d 464 (1968).

Prior to retrial, hearings were held on or about June 4, 1970, July 29, 1970 and August 17, 1970 with regard to Petitioner's pre-trial motions as to Change of

Venue and Suppression of Confession and Evidence Obtained Therefrom. The Court by Memorandum and Order filed September 21, 1970 denied the Change of Venue request and indicated that it would be bound by the guidelines as to suppression of evidence as set forth by the Supreme Court of Pennsylvania in its opinion rendered in the instant case found at *Commonwealth vs. Yount*, 435 Pa. 276, 256 A.2d 464 (1969) *cert. denied*, 397 U.S. 925 (1970). A second Petition for Change of Venue was filed November 13, 1970 during jury selection for the instant case, but was denied by Memorandum and Order of the Court dated November 14, 1970.

Jury selection for the retrial commenced November 4, 1970, with the actual trial beginning on November 17, 1970. On November 20, 1970 the jury in the instant matter returned a verdict of guilty of Murder of the first degree. The Rape charge was not tried by the Commonwealth at retrial. The Petitioner was formally sentenced March 26, 1973 and appealed to the Supreme Court of Pennsylvania. That Court by opinion found at *Commonwealth vs. Yount*, 455 Pa. 303, 314 A.2d 242 (1974) affirmed the judgment of sentence.

The Petitioner, pursuant to 28 U.S.C. §2254, filed a Petition for Writ of Habeas Corpus pro se on or about January 5, 1981. The Respondents filed an Answer on or about March 24, 1981. Subsequent to that date the Office of the Federal Public Defender was appointed to represent the Petitioner. An Amended Petition for Writ of Habeas Corpus was filed on or about July 1, 1981, with the Respondents filing an Amended Answer on or about August 14, 1981.

Evidentiary hearings were held on November 3, 1981 and December 28, 1981, at which time both parties placed testimony on record with regard to the merits of the Petition.

On February 12, 1982, the Honorable Robert C. Mitchell, United States Magistrate, recommended that a Writ of Habeas Corpus issue on the basis that: "Given the pervasive community knowledge of the facts of this case and the prevailing opinion as to Yount's guilt, as well as the strong community hostility towards the petitioner, it does not appear that the empanelled jury was 'capable and willing to decide the case solely on the evidence before it' but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." *Magistrate's Report and Recommendation* at page 18.

II. *Objections to Magistrate's Report and Recommendations*

The law seems well established in the Commonwealth of Pennsylvania that a motion for change of venue is addressed to the Trial Court's discretion. The theory being that the Trial Court is in the best position to assess the community atmosphere and publicity surrounding the trial. A decision by the Trial Court will not be disturbed on appeal absent a showing of an abuse of discretion. *Commonwealth vs. Tolassi*, 480 Pa. 41, 413 A.2d 1003, 1007 (1980); *Commonwealth vs. Rigler*, 488 Pa. 441, 412 A.2d 846, 850 (1980); *Commonwealth vs. Heath*, 275 Pa. Super. 478, 419 A.2d 1, 4-5 (1980). Such was also the state of the law at the time of Petitioner's trials in 1966 and 1970.

Commonwealth vs. Swanson, 432 Pa. 293, 248 A.2d 12 (1968); *Commonwealth vs. Green*, 396 Pa. 137, 151 A.2d 241 (1959); *Commonwealth vs. Richardson*, 392 A.2d 528, 140 A.2d 828 (1958).

Petitioner, at the conclusion of the 1970 retrial, presented the issue as to pre-trial publicity and change of venue as one of his basis for appeal to the Pennsylvania Supreme Court. That Court in its opinion at *Commonwealth vs. Yount*, 455 Pa. 303, 314 A.2d 242, 247-248 (1974) stated: "These findings (no excessive pre-trial publicity) fully supported by the record, do not sustain appellant's claim, and the Court properly denied appellant's motion for a change of venue predicated on this theory. *Commonwealth vs. Pierce*, 451 Pa. 190, 303 A.2d 209 *cert denied*, 414 U.S. 878, 94 S.Ct. 164, 38 L.Ed.2d 124 (1973); *Commonwealth vs. Johnson*, 440 Pa. 342, 269 A.2d 752 (1970)." Petitioner further argued before the Pennsylvania Supreme Court that the community as a whole was so prejudiced against him that it would be impossible for veniremen to set aside their feelings and grant him a fair trial. The Supreme Court in response to this assertion held: "Neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of prejudice or a 'pattern of deep and bitter prejudice' shown ... 'throughout the community' which would require a change of venue. *Irvin vs. Dowd*, 366 U.S. 717, 725, 727, 81 S.Ct. 1639, 1644, 1645, 6 L.Ed.2d 751 (1961). See *Commonwealth vs. Hoss*, 445 Pa. 98, 103-07, 283 A.2d 58, 61-63 (1971); *Commonwealth vs. Swanson*, 432 Pa. 293, 248 A.2d 12 (1968) *cert. denied*, 394 U.S. 949, 89 S.Ct. 1287, 22 L.Ed.2d 483 (1969)." *Commonwealth vs. Yount*, 455 Pa. 303, 314

A.2d 242, 247 (1974). The Supreme Court of Pennsylvania held that upon reviewing the record before it, the Trial Court had not abused its discretion in denying Petitioner's change of venue motions.

The Federal Courts follow similar guidelines with regard to the review of change of venue decisions within that Court system. "Generally, a motion for a change of venue is addressed to the discretion of the trial court and a refusal to grant such a motion will not be set aside absent an abuse of discretion. *United States vs. Addonizio*, 451 F.2d 49, 61 (3d Cir.), cert. denied, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972); *Commonwealth vs. Rolison*, 473 Pa. 261, 266, 374 A.2d 509, 511 (1977)." *Martin vs. Warden*, 653 F.2d 799, 804 (3d Cir. 1981). However, when reviewing an assertion as to pre-trial publicity and change of venue in a habeas corpus proceeding from a state conviction, the federal court's review narrows considerably. "A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial. (Emphasis added). *Murphy vs. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1974). See also *Dobbett vs. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed.2d 344 (1977)." *Martin vs. Warden*, 653 F.2d 799, 805 (3d Cir. 1981).

"Pre-trial publicity exposure will not automatically taint a juror." *United States vs. Provenzano*, 620 F.2d 985, 995 (3d Cir.) cert. denied, U.S. , 101 S.Ct. 267, 66 L.Ed.2d 129 (1980). Accord, *United*

States vs. Feliziani, 472 F.Supp. 1037, 1044 (E.D. Pa. 1979) *affirmed*, 622 F.2d 580 (3d Cir. 1980); *Martin vs. Warden*, 653 F.2d 799, 804 (3d Cir. 1981). "Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based on the evidence presented at trial." *United States vs. Provenzano*, 620 F.2d 985, 995 (3d Cir.) *cert. denied*, U.S. , 101 S.Ct. 267, 66 L.Ed.2d 129 (1980); *Martin vs. Warden*, 653 F.2d 799, 804 (3d Cir. 1981).

With regard to the instant case, the record of voir dire at the second trial indicates that of the twelve (12) jurors who actually served on the panel, which heard Petitioner's case, nine (9) were accepted for the jury by both the Commonwealth and the defense *without challenges of any form* being made. Each one of these nine persons indicated that they had no opinion as to Petitioner's guilt or innocence. (Hoover, Clapsaddle, Yorke, Waple, Karetski, Hummell, Parks, Undercoffer, Murphy). Of the three (3) persons who were challenged, two (2) indicated they had no opinion whatsoever (Kurtz, Harchak) and the remaining one (1), although stating he had an opinion, indicated he would enter the jury box with an open mind and that his verdict would be based on the evidence presented at trial. (Hrin).

Even though the record of voir dire establishes that the jurors were unprejudiced and nothing to refute such a finding was introduced at the evidentiary hearings held before the Magistrate, the Report and Recommendation clearly indicates the feelings of the Magistrate that the sworn testimony of the jury panel

should be set aside. This finding is based upon the Magistrate's opinion that "Given the pervasive community knowledge of the facts of this case and the prevailing opinion as to Yount's guilt, as well as the strong community hostility towards the petitioner, it does not appear that the empanelled jury was 'capable and willing to decide the case solely on the evidence before it' but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." *Magistrate's Report and Recommendation*, p. 18. It is apparent that the Magistrate, by his holding, is applying the standards originally set forth in *Marshall vs. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). The *Marshall* standard clearly allows for a federal court to find that when persons learn from news sources information with a high potential for prejudice such persons may be presumed to be prejudiced despite their assurances that they could remain impartial. Under the federal system, the representations of the jury members at Petitioner's trial, even though under oath, may be set aside.

The *Marshall* standard, however, is wholly inapplicable to a state court proceeding. *Murphy vs. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975); *Martin vs. Warden*, 653 F.2d 799, 804-805 (3d Cir. 1981). Justice Marshall in *Murphy* stated: "In the face of so clear a statement, it cannot be maintained that *Marshall* was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States ... We cannot agree that *Marshall* has any application beyond the federal courts." *Murphy vs. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975).

Therefore, the sworn testimony of the jurors as to their ability to remain impartial may not be disregarded. The record before the Magistrate is such that no evidence was presented to refute the assertions made by the jurors as to their ability to decide the case on its merits. The evidence presented as to publicity about the instant case, although indicating that the case was indeed publicized, does not evidence any form of insensitive and active official involvement in its promotion or propagation. There is simply no basis upon which a presumption of prejudice of jurors could arise such that their unrefuted sworn testimony may so easily be disregarded.

Conclusion

On the basis of the foregoing arguments, it is respectfully requested that the Magistrate's Report and Recommendation that a Writ of Habeas Corpus be issued directing that Petitioner be retried within sixty (60) days be denied and that the Court dismiss the Petition of Jon E. Yount for Writ of Habeas Corpus.

Respectfully submitted,

F. Cortez Bell, III, Esquire

Assistant District Attorney

[Certificate of Service Omitted]

AMENDMENT TO PETITION FOR WRIT OF
HABEAS CORPUS AND AMENDED PETITION
FOR WRIT OF HABEAS CORPUS
[Caption Omitted]

AND NOW comes the Petitioner, Jon E. Yount, by his attorney, George E. Schumacher, Federal Public Defender, and files this Amendment to petitioner's original Petition for Writ of Habeas Corpus and the Amended Petition for Writ of Habeas Corpus filed July 1, 1981, and avers the following:

1. Jon E. Yount filed a Petition for Writ of Habeas Corpus, in forma pauperis, in the United States District Court for the Middle District of Pennsylvania, which was transferred to this Court pursuant to the provisions of Section 2241(d) of Title 28, United States Code.

2. The respondents filed a timely Answer to the Petition for Writ of Habeas Corpus, on March 24, 1981.

3. On April 16, 1981 the Federal Public Defender's Office was appointed to represent the petitioner.

4. On July 1, 1981 an Amendment was filed to the petitioner's Petition for Writ of Habeas Corpus.

5. The respondents filed an Answer to the Amended Petition for Writ of Habeas Corpus on August 14, 1981.

6. Hearings on the Petition for Writ of Habeas Corpus were held before the Hon. Robert C. Mitchell, United States Magistrate, on November 3, 1981 and December 28, 1981.

7. On February 12, 1982 Magistrate Robert C. Mitchell filed his Magistrate's Report And Recommendation, recommending that the petition of Jon E. Yount for a writ of habeas corpus be granted and that he be discharged from custody unless, within sixty days, the Commonwealth retrieves him under circumstances that will assure a fair and impartial jury.

8. Respondents' Objections to Magistrate's Report and Recommendation were filed on February 23, 1982.

9. Petitioner, Jon E. Yount, files this Amendment to exclude those portions of his Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus filed July 1, 1981 which were not exhausted in the state court, including, but not limited to, Paragraphs 12-C(a), 12-C(b), 12-C(c), 12-C(d), 12-C(e), 12-C(f) and 12-D. As well as subparagraphs 1, 2, 3 and 4(a) through (f) of the Amended Petition.

10. In a telephone conversation on March 10, 1982, the petitioner, Jon E. Yount, conferred with the Federal Public Defender's Office and consented to the deletion of any and all claims made in his Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus which were not exhausted in the state court.

WHEREFORE, petitioner, Jon E. Yount, respectfully requests this Honorable Court to grant the exclusion of those portions of his Petition for Writ of

Habeas Corpus and Amended Petition for Writ of Habeas Corpus which were not exhausted in the state court.

Respectfully submitted,

(s) George E. Schumacher

George E. Schumacher

Federal Public Defender

Attorney for Petitioner

Jon E. Yount

March 10, 1982

George E. Schumacher, Esq.
Federal Public Defender
590 Centre City Towers
Pittsburgh, Pa. 15222

RE: *Yount v. Bartle*, C.A. 81-234

Dear Mr. Schumacher:

In order to facilitate the final disposition of my Petition for Writ of Habeas Corpus now under review by the United States District Court for the Western District of Pennsylvania, I authorize you, as my appointed counsel-of-record in the above-captioned case, to further amend said Petition for Writ of Habeas Corpus in the following manner:

1. To delete paragraph 12-D, as filed on July 1, 1981, in its entirety; and,
2. To delete whatever subsections of paragraph 12-C (a,b,c,d,e,f), as contained in the original petition filed on January 5, 1981, as you

*Amendment to Petition
Order, March 31, 1983*

781a

determine require deletion in order to expedite the final resolution of this case.

I give this authorization with the full knowledge that by so doing I have waived future consideration of these issues by the federal courts of the United States.

Sincerely,

(s) Jon E. Yount

Jon E. Yount, Petitioner
P. O. Box 200; C-8297
Camp Hill, Pa. 17011

DATED: March 10, 1982

(1) (s) R. Delhavar
Witness

March 10, 1982
Date

(2) (s) John R. Krall
Witness

3/10/82
Date

ORDER OF COURT
[Caption Omitted]

AND NOW, to-wit, this 31st day of March, 1982, upon consideration of Petition, Jon E. Yount's, within Amendment to Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that those portions of petitioner's Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus which were not exhausted in

782a

*Amendment to Petition
Order, March 31, 1982*

the state court, including, but not limited to, Paragraphs 12-C(a), 12-C(b), 12-C(c), 12-C(d), 12-C(e), 12-C(f) and 12-D, as well as subparagraphs 1, 2, 3 and 4(a) through (f) of the Amended Petition, be and the same are hereby excluded from the allegations made in his petition for writ of habeas corpus.

(s) Donald E. Ziegler
United States District Judge

Jon E. YOUNT, Petitioner,

v.

Ernest S. PATTON, Superintendent SCI—Camp Hill,
and Harvey Bartle III, Attorney General of the Com-
monwealth of Pennsylvania, Respondents.

Civ. A. No. 81-234.

UNITED STATES DISTRICT COURT,
W. D. Pennsylvania.

April 22, 1982

[537 F. Supp. 873 (1982)]

OPINION

ZIEGLER, District Judge.

Presently before the court is the petition of Jon E. Yount for a writ of habeas corpus alleging that his state court conviction of first degree murder is constitutionally infirm. We hold that Yount has failed to establish a violation of the Due Process Clause of the Fourteenth Amendment and therefore relief will be denied.

I. History of Case

Petitioner was indicted for the crimes of murder and rape at No. 2 May Sessions 1966 in the Court of Common Pleas of Clearfield County, Pennsylvania.

On October 7, 1966, he was convicted by a jury of first degree murder and rape and an appeal was taken from the judgment of sentence. The Supreme Court of Pennsylvania reversed and granted a new trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925, 90 S.Ct. 918, 25 L.Ed. 2d 104 (1970). The prosecutor dismissed the rape charge prior to re-trial and, following selection of a jury, Yount was again convicted of first degree murder. A life sentence was imposed. An appeal was taken.

The Supreme Court of Pennsylvania unanimously affirmed the judgment in *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974), and petitioner filed the instant pro se action, pursuant to 28 U.S.C. §2254, advancing three issues. Counsel was appointed and filed an amendment to the petition with additional contentions. On March 2, 1982, the Supreme Court of the United States announced its decision in *Rose v. Lundy*, U.S. , 102 S.Ct. 1198, 71 L.Ed. 2d 379 (1982). Counsel for petitioner then filed a motion to amend the original and amended petitions to comply with the teachings of *Rose*. There the Supreme Court explained "that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."

U.S. at , 102 S.Ct. at 1199.

On March 31, 1982, this court granted Yount's motion to delete from the original petition paragraphs 12-C (a), 12-C(b), 12-C(c), 12-C(d), 12-C(e), 12-C(f) and 12 D, as well as subparagraphs 1, 2, 3 and 4(a) through (f) of the amended petition. Thus we are required to

decide the three issues raised by Yount at paragraphs 12-A, 12-B and 12 C of the original petition, since it is clear that he has exhausted the remedies available to him in the courts of Pennsylvania. See, *Brown v. Cuyler*, 669 F.2d 155 (3d Cir. 1982).

This court is limited to those issues because as *Rose* and *Brown* make clear we may consider only claims that have been exhausted in state court. In *Yount II* Justice Roberts, speaking for the Court, specifically addressed the issues raised in paragraphs 12-A, 12-B and 12-C of the original petition. We need not decide, of course, whether Yount may be precluded by Habeas Corpus Rule 9(b), 28 U.S.C. §2254, from pursuing subsequent federal petitions by seeking speedy federal review of the exhausted claims. But see, *Rose v. Lundy*, U.S. at - , 102 S.Ct. at 1203-1205. In sum, we hold that petitioner has exhausted his state court remedies as required by 28 U.S.C. §2254 (1976) with respect to the three challenges set forth in the original petition for habeas relief.

II. Discussion

Yount's original petition was referred to a magistrate of this court for consideration of the following allegations:

12-A. Petitioner's conviction was obtained by a violation of his privilege against self-incrimination through the use of oral statements elicited without required *Miranda* warnings.

12-B. Petitioner's conviction was obtained in violation of his constitutional right to select and empanel a fair, impartial and "indifferent" petit jury.

12-C. Petitioner's conviction was obtained in violation of his constitutional right to a fair and im-

partial trial as a result of trial court prejudicial charge to the jury and included erroneous instructions.

The magistrate issued a report and recommendation in which he found no constitutional transgression with respect to contentions 12-A and 12-C. We agree with those findings and therefore we will adopt and incorporate as the opinion of the court the findings of the magistrate as to those allegations of the original petition. We reject, however, the recommendation of the magistrate that a writ be granted and Jon Yount discharged from custody unless, within 60 days, a new trial is granted, predicated on a violation of the Due Process Clause of the Fourteenth Amendment, because petitioner was allegedly denied a fair and impartial jury.

Our starting point must be the recent pronouncement of the Supreme Court concerning the ambit of our authority to reverse this state court judgment.

A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution. As we said in *Cupp v. Naughten*, 414 U.S. 141, 146 [94 S.Ct. 396, 400, 38 L.Ed. 2d 368] (1973): "Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment."

Absent such a constitutional violation, it was error for the lower courts in this case to order a new trial. . . . Federal courts hold no supervisory authority over

state judicial proceedings and may intervene only to correct wrongs of constitutional dimension. *Chandler v. Florida*, 449 U.S. [560] at 570, 582-583 [101 S.Ct. 802 at 807, 813-814, 66 L.Ed. 2d 140]; *Cupp v. Naughten*, *supra*, [414 U.S.] at 146 [94 S.Ct. at 400]. No such wrongs occurred here.

Smith v. Phillips, U.S. , , 102 S.Ct. 940, 946, 71 L.Ed. 2d 78 (1982). In performing our jurisprudential function, we have been cautioned by the Supreme Court that the findings of a state court judge are presumptively correct under 28 U.S.C. §2254 (d), and the presumption can only be overcome by convincing evidence to the contrary. *Id.* at , 102 S.Ct. at 946; *Summer v. Matter*, 449 U.S. 539, 551, 101 S.Ct. 764, 771, 66 L.Ed. 2d 722 (1981).

Petitioner's constitutional challenge of the decision of the trial judge to deny timely motions for a change of venue involves three discrete arguments. First, excessive and biased pretrial publicity prevented a fair trial; second, substantial community bias required a change of venue; and third, the trial court erred in denying several challenges for cause. Petitioner bears the burden of proving all facts entitling him to discharge, *Brown v. Cuyler*, *supra*, at 158, and since he has raised the issue of pretrial publicity, federal law requires that Yount's conviction may be overturned only upon a showing that the publicity was so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has "utterly corrupted" the trial. *Murphy v. Florida*, 421 U.S. 794 at 798, 95 S.Ct. 2031 at 2035, 44 L.Ed. 2d 589 (1974).

A.

The record in the instant case contains two memoranda and one opinion by the trial judge relating to his decision to deny a change of venue. Pretrial publicity is discussed in each. The first was filed on September 21, 1970, prior to selection of the jury. The court found:

[T]he evidence was limited to the fact that without editorial comment of any kinds the newspapers in the County reported the decision of the Supreme Court of Pennsylvania; but it is to be noted that they not only referred to the dissenting opinion and quoted it, but also to the majority opinion and quoted it. We do not believe that the mandates of the cases extend so far as to say that the news media cannot publicize, without editorial comment, the decisions of our Courts. . . .

Brief of respondents at 20-21. The second memorandum is dated November 14, 1970, after 156 jurors had been interrogated during an 8-day period. The judge found:

The Court would also note that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there has been little, if any, talk in public concerning the trial from that time to the time when it was announced that a trial date had been fixed. . . .

Nor do we find any unfair inferences or prejudicial effects as to or against the defendant resulting in any of the newspaper items which have been the subject of the affidavit filed in this regard on November 13, 1970. With all of the publicity to which

they refer, this Court is cognizant that at no time since the commencement of this case on November 4, 1970, have there been any more than 4 spectators in the Court Room, and at most times, 2 of these were 'Court House hangers on.' This is some indication of the fact that particularly in a community as small as ours, there has not been any great effect created by any publicity. . . .

Brief of respondents at 24-25. The final factual finding is found in the post-trial opinion of January 15, 1973.

The first of the trials occurred in 1966, and is pointed out herein, the second one occurred in 1970. As the record will indicate there was practically no publicity given to this matter through the news media in the meanwhile except to report that a new trial had been granted by the Supreme Court. It is to be noted also that throughout the second trial there was practically no public interest shown in the trial; one thing to be noted is that on some days there being practically no persons present even to listen to it. . . .

The foregoing represent findings by a state court judge that are presumptively correct under the teachings of *Summer, supra*. The pretrial publicity in Clearfield County prior to trial was found to be balanced and accurate, and we cannot conclude from our independent review of the record that there is convincing evidence to the contrary.

The journalistic reports that Yount was to be retried for the crimes for which he was indicted were not inflammatory so as to preclude a fair trial. To accept petitioner's

argument would require a change of venue in all prominent criminal cases that are retried merely because they are reported by the press. There is no constitutional precedent for such an assertion. The news reports concerning the exhaustion of various jury panels and the progress of voir dire are to the same effect. Finally, we find the record barren of evidence to support petitioner's contention that the journalists of Clearfield County intentionally failed to report the good faith decision of the prosecutor to dismiss the rape charge prior to trial. The decision to dismiss was based on a lack of admissible evidence at the second trial and we find that the press accurately reported the status of the case when the information became public knowledge. See, Exs. P 1-11, mm, ss, tt, uu, vv and yy.

Most importantly there is no evidence of record of official misconduct either in dismissing the rape charge prior to trial, or in influencing the publicity given the case as in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963) or *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966). Nor does the pretrial publicity reveal the viciousness evidenced in *Rideau*, *Sheppard* or *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961). Finally, the publicity in quantity does not approach the mischief detected in *Sheppard*. We are presented, at best, with substantial knowledge in a County of 78,000 citizens that a new trial had been granted in a case involving a significant crime. We find that petitioner has failed in his burden of establishing publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County, or that the coverage utterly corrupted the judicial process. *Martin v. Warden*, 653 F.2d 799, 805 (3d Cir. 1981).

B.

Yount next contends that the trial court's decision to deny a change of venue in the face of alleged substantial community bias prevented the selection of an impartial jury and thus denied him a fair trial in contravention of the Sixth and Fourteenth Amendments. Citing statistics that support a finding of general knowledge of the pending cause, Brief of petitioner at 7-8, 26-27, and that many of the prospective jurors expressed fixed opinions as to guilt, Brief of petitioner at 27, Yount would have us hold that the trial judge committed error of constitutional magnitude when he denied a change of venue. We disagree. The extensive latitude granted by the trial judge during voir dire, as well as the responses of the twelve jurors who were sworn to try this case satisfy the constitutional standard of due process under the Fourteenth Amendment.

Again we must look to the factual findings of the trial court. In its opinion denying post-trial motions, the court found:

The mere fact that it took such a long time to select a jury was simply that defendant raised so many questions and the Court exercised its discretion to assure that there could be no complaint about the final jury empanelled. Certainly because it takes a lengthy time to select a jury is not a sufficient basis for declaring that there is any prejudice or bias whatever involved. In fact, as already indicated this Court perceived no bias or prejudice resulting in any manner.

Brief of respondents at 28. The court also made reference to this contention in its second memorandum dated November 14, 1970, after 121 jurors had been excused for cause. Twelve jurors had been seated. The court observed:

It is to be considered also that fair trial is not precluded in this case; when one recognizes that almost all, if not all, jurors already seated had no prior or present fixed opinion, and this was established by a very searching examination and cross-examination by counsel for defendant.

This ambiguous statement by the trial court and our duty of independent review requires us to examine the voir dire proceedings to determine whether there is evidence of community passion so pervasive that the accused was denied a fair trial before a "panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed. 2d 751 (1961). We find there is none.

Jurors Blair Hoover, Clair Clapsaddle, John Yorke, Mary Jane Waple, Martin Karetski, Julia C. Hummell, Mrs. Jessie M. Parks, Albert I. Undercoffer, and Robert P. Murphy were seated without challenge or objection from Yount. Thus a strong argument can be made that petitioner has failed to preserve any argument with respect to these jurors, since he was represented throughout the trial by able, experienced and prominent counsel. More importantly, however, these jurors expressed no fixed opinion concerning guilt. Jurors Irene Kurtz, John T. Harchak and James J. Hrin were challenged for cause but Kurtz and Harchak indicated that they harbored no fixed opinion,

and Hrin stated that, although he had an opinion, he would keep an open mind and would base his decision on the evidence presented at trial.

Yount continues to urge that these jurors maintained a fixed opinion concerning his guilt following lengthy interrogation. But our reading of the record is to the contrary. It is true, of course, that several jurors expressed an opinion on the ultimate issue at the outset. But this does not disqualify a citizen from participation in the judicial process if the juror is able to set aside any preconceived notion and render a verdict based on the evidence presented in court. *Martin v. Warden*, 653 F.2d 799, 806 (3d Cir. 1981); *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir. 1980), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed. 2d 129 (1980).

Due to petitioner's allegation that community bias prevented the selection of a fair and impartial jury, we will review the critical responses of each juror during voir dire.

JUROR NO. 1—*Blair Hoover*

Q. Do you have any kind of fixed opinion as to his guilt or innocence?

A. On this question I would have to hear both sides—the facts—before I feel that I could express a true opinion.

Q. The question was, Mr. Hoover, whether or not you have an opinion now, at this time?

A. No.

Q. No opinion at all?

A. No.

* * * * *

Q. And back at the time you heard these things and read these things, did you have an opinion?

A. Let's see. I would say that you'd come to some opinion, as far as just opinion on what you heard or what you may have read, but to me, as the way I've seen things in papers, in many papers, not to discredit any one paper, this don't say this is fact. So as far as forming a true opinion, I couldn't just do it by what I read. You'd read one thing and then another and somebody else would say something else. There was a lot of different opinions and I heard opinions both ways on it, in many different ways. Does that answer your question?

Q. It makes me think of a couple more.

A. Let me say this. If this would help you any, as I say, I heard as far as hearing—it wasn't one sided. I heard both ways so until you would know the true facts you couldn't—no one could come to a true opinion.

Transcript at 64-65.

* * * * *

Q. Notwithstanding what you have read and heard concerning Mr. Yount, you are able to presume Mr. Yount innocent of any offense at this time?

A. Well, I feel any man or woman is innocent until proven guilty.

Q. My question is, do you feel that way concerning Mr. Yount at this time?

A. That would cover Mr. Yount too. I said any man or woman.

Q. You definitely have that feeling about Mr. at this time—that he is innocent?

A. He would have to be innocent until proven guilty.

Transcript at 69

JUROR NO. 2—*Clair Clapsaddle*

Q. You have formed some opinion?

A. Well, yes.

Q. Now, is that opinion rather firm and fixed in your mind?

A. Well, I couldn't say it would be, no.

Q. Are you aware of a principle of law we have in Pennsylvania that says an individual who is accused of a crime is presumed innocent until proven guilty—are you aware of that?

A. Yes sir.

Q. Would your present opinion be such that you could accept that general rule that Mr. Yount is presently presumed innocent until proven guilty?

A. That's the way it's supposed to be and.

Q. Assuming it is supposed to be one way—my question is, will you accept it?

A. Yes.

Q. Would you?

A. Yes.

Transcript at 206-207.

* * * * *

Q. Is there anything you know of at this time which would influence your judgment in this case if you were a juror other than the evidence which would come forth in this case at this time?

A. No.

Q. Mr. Clapsaddle, at one point you did indicate you had had some opinion?

A. Yes.

Q. Are you able to erase that opinion from your mind now and afford the defendant the presumption of innocence?

A. Yes I could, yes.

Q. Having been informed again, let me just say this once more—having been informed now that the defendant is entitled to this presumption of innocence that I mentioned to you, have you erased your opinion and are you now affording the defendant that presumption?

A. That he is innocent?

Q. Yes, until proven guilty?

A. Yes.

Transcript at 210-211.

JUROR NO. 3—*John Yorke*

Q. Mr. Yorke, do you know of the matter involving Jon Young?

A. No.

Q. Have you read anything about Mr. Yount?

A. No.

Q. You don't know anything about the reason why you're here—or why you were called to come here as a prospective juror?

A. No I don't know.

Q. Have you read anything in the newspaper about it?

A. No.

Q. Have you heard any discussions or heard any radio broadcasts about it?

A. No.

Transcript at 370.

* * * * *

Q. Mr. Yorke, do you have any opinion as to this case that we're talking about. Do you know what case we're talking about now?

A. Yes, it's a Mr. Yon you say.

Q. Jon E. Yount?

A. Yes, Jon Yount.

Q. Do you have any reason—strike that—do you have any opinion as to his guilt or innocence?

A. No I have no opinion.

Q. You have no opinion at all?

A. No.

Transcript at 376.

JUROR NO. 4—*Mary Jane Waple*

Q. Do you Mrs. Waple, presently at this time, have an opinion about Mr. Yount's guilt or innocence?

A. No.

Q. You don't have any opinion at all?

A. I don't know anything about the man or about this case, only what I have read years ago and hardly remember that.

Q. Well you do remember something based upon what you read and heard several years ago—is that true?

A. Yes.

Q. Does that cause you to have an opinion at this time about him—without telling what your opinion is?

A. I don't have an opinion.

Q. You don't have any opinion?

A. No, I just don't know.

Q. You don't know what?

A. I don't know if he's innocent or guilty.

Q. I'm not asking you that.

A. I don't have an opinion. I'm not judging him.

Transcript at 412.

JUROR NO. 5—*James F. Hrin*

Q. Let me ask—if you were to be selected as a juror in this case and take the jury box, could you erase or remove the opinion you now hold and render a verdict based solely on the evidence and law produced at this trial?

A. It is very possible. I wouldn't say for sure.

Q. Do you think you could?

A. I think I possibly could.

Q. Then the opinion you hold is not necessarily a fixed and immobile opinion?

A. I would say not, because I work at a job where I have to change my mind constantly.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the Judge?

A. That I could do.

* * * * *

Q. Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?

A. Definitely. If the facts show a difference from what I had originally—had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind—is that your position?

A. Well—I have nothing else to go on.

Q. I understand. Then the answer is yes—you would not change your mind until you were presented facts?

A. Right, but I would enter it with an open mind.

Transcript at 441-442.

JUROR NO. 6—*Martin Karetski*

Q. Do you have an opinion today as to his guilt or innocence?

A. It's been a long time ago and I'm not too sure now. It was in the paper he plead not guilty.

Q. What you just read the other day—

A. I think about Tuesday or Wednesday's paper.

Q. So based upon what you read about it a long time ago as well as what you read about it within the last few days, do you have an opinion as to his guilt or innocence?

A. Honestly, I couldn't say now.

Q. Are you saying you don't have an opinion or don't know if you have an opinion?

A. I probably don't know if I have an opinion.

Q. Let me ask you this then. In case you do have an opinion, could you wipe it out of your mind—erase it out of your mind before you would take a seat in the jury box and hear whatever evidence you might hear?

A. As it is right now I have no opinion now—four or five years ago I probably did but right now I don't.

Transcript at 561-562.

JUROR NO. 7—*Julia C. Hummel*

Q. Then you do have an opinion regardless of what it was based on—do you have an opinion right now?

A. I really don't know what to say. I don't know what would be the truth, whether to say yes or no.

Q. You mean you can't tell which would be the truth and which would not be the truth?

A. I can't say that he was guilty or that he wasn't.

Q. I'm not asking you that. I'm asking whether or not you have an opinion as to which it is, without telling me which opinion you have. Do you have an opinion as of right now?

A. No.

Transcript at 792-793.

JUROR NO. 8—*Mrs. Jessie M. Parks*

Q. During the process of thinking about it and before you went through the process of thinking less

and less about it, did you form any opinion as to the guilt or innocence of Mr. Yount?

A. Well, truthfully I can say this. I felt this way about it. You know they say there's two sides to every story. Like they say, our Courts are here until the man is proved guilty or innocent and I felt this way—and in a lot of ways it didn't jibe with me and in a lot of ways it did. I can't say he's guilty or I can't say he isn't guilty and that's what my opinion is. I'm not saying yes or no. But I felt that I wouldn't want to be on the jury but then I felt—if it was my duty and I would be called I would do the best of my ability but here is Judge Cherry this morning—his summation of it. I can't exactly say in his words—either you have to prove whether he is guilty or whether he isn't. If you can remember what you said when you talked—I'm sorry—what I mean—you can say well he is, but when you get to thinking can you truly say until you actually know. When the trial was on I didn't read any of it and I didn't get up the assumption to say he's guilty and I can't say he isn't guilty. It's just the same thing and—but so—that's the way I feel about it. Now as far as my opinion which you want, well, I would definitely have to hear it before I could say one way or other. If I'm selected that's okay and if you don't think I'm qualified that's okay too.

Transcript at 814.

JUROR NO. 9—*Albert I. Undercoffer*

Q. Well, taking all of these factors into consideration as you have Mr. Undercoffer, would you

give it a little bit of thought now and tell me whether or not you have an opinion as of right now, just based upon what you know and have heard and thought about. Do you have an opinion as of right now as to his guilt or innocence?

A. No. I think I would have to hear the testimony of both sides and I think I would form my opinion after I hear the testimony of both sides.

* * * * *

A. It's a little bit like the Court, if somebody makes a statement in Court, the Judge would say, strike that from the record. The jury would be supposed to forget about that. It would be a very difficult thing to do.

Q. It sure is. We have been trying to battle that one for years.

A. I believe for myself—I believe that I could. I would be capable of rendering a fair decision on what I had heard here. I have faith enough in myself.

Transcript at 857-858.

JUROR NO. 10—*Robert P. Murphy*

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. No I have not.

Q. May I assume then Mr. Murphy, if you were selected as a juror you could go into the jury box and base your verdict solely on the testimony and evidence along with the instructions that the Judge would give you?

A. That's true.

Q. And that you would carry no opinion with you into the jury box?

A. No.

Transcript at 922.

JUROR NO. 11—Irene Kurtz

Q. Have you formed an opinion as to the innocence or guilt of this defendant?

A. No.

Q. If you were selected to sit as a juror, would you be able to base your verdict solely—only on the testimony and evidence you would have and the instructions the Judge would give you?

A. Yes.

Q. And that no prior information or idea you may have would enter into your deliberation?

A. No.

Transcript at 988.

JUROR NO. 12—John T. Harchak

Q. Have you formed an opinion as to the guilt or innocence of this defendant?

A. No I haven't.

Q. Mr. Harchak, if you were selected as a juror in this case, would you be able to enter the jury box and base your verdict of guilty or innocent only on the evidence and testimony that you would hear along with the instructions that the Judge would give you?

A. Yes.

Q. And you would have no other influencing factors in arriving at your verdict?

A. No, other than the testimony I would hear in this Court Room.

Transcript at 1119.

These responses not only meet the test of *Murphy* and *Martin* but refute petitioner's assertion that he failed to obtain a fair and "indifferent" jury in Clearfield County. Moreover, his assertion of substantial community bias and presumptive prejudice is belied by the record. The state court initially summoned seventy-three prospective jurors. The trial judge excused fifty-six for cause and Yount exercised nine peremptory challenges. The Commonwealth exercised one peremptory challenge and four jurors were seated, after one seated juror was excused due to a death of a family member. These percentages are not remarkable to anyone familiar with the difficulty in selecting a homicide jury in Pennsylvania¹ and we find neither an abuse of discretion nor a constitutional violation when the trial judge determined to summon additional jurors while denying Yount's motions to change venue.

The trial court and counsel interrogated an additional sixty-eight citizens, or one hundred forty-one in total, before a jury was selected. Twenty-three peremptory challenges had been exercised. Extensive latitude was granted during voir dire to ascertain the "Mental attitude of appropriate indifference." *Irvin v. Dowd*, 366 U.S. at 724-

¹ As was done here, Pennsylvania law requires individual voir dire beyond the presence of other jurors; under oath; recorded; and with the participation of the court and counsel. Pa.R.Crim.P. 1160.

25, 81 S.Ct. at 1643-1644, and we find nothing in the pretrial publicity, or the responses of the citizens who were excused for cause, or the number of such recusals, or the attitudes of the jurors who were seated, that leads to the conclusion that the venire was presumptively prejudiced so as to require a change of venue. We hold that petitioner has failed to sustain his burden of proving that the trial court committed constitutional error when it denied the motions to change venue. Petitioner has failed to establish that community bias prevented the selection of an impartial jury in Clearfield County in contravention of the Fourteenth Amendment.

C.

Petitioner's final argument relates to the trial court's decision to deny certain challenges for cause thereby requiring the accused to exercise peremptory challenges. We find no constitutional infirmity in this regard.

Irene Kurtz and John T. Harchak were seated as jurors after Yount had exhausted his discretionary challenges. But as we have noted, a challenge for cause with respect to both jurors was not constitutionally required. Kurtz stated that she maintained no opinion as to guilt, and further that she was able to decide the case solely upon the evidence presented. Transcript at 988. The testimony of Harchak is to the same effect. Transcript at 1119. The decision of the trial judge was a discretionary function and did not implicate the Fourteenth Amendment.

Petitioner also urges that a challenge for cause was constitutionally required with regard to potential jurors Marcia Polkinghorn, James F. Decker, Marie E. Richard-

son and Ruth I. Hudson. None of these persons were seated as jurors but Yount claims that he was required to utilize discretionary challenges due to the trial court's erroneous rulings.

Marcia Polkinghorn testified that she had an opinion of guilt following publication of the prior adjudication. Transcript at 755-56. Further that she would "try" to defer her opinion in deference to the law and facts presented in court. Transcript at 764. James Decker indicated that he was of the mind that Jon Yount was guilty. Transcript at 898, 900. But he also testified that he would "try the case solely on the evidence and law." Transcript at 901. Marie Richardson observed that she had no opinion as to guilt, Transcript at 957, but she preferred not to serve due to anxiety as well as a recent death in the family. Transcript at 964. Finally, Ruth Hudson responded that she had a fixed opinion of guilt, Transcript at 1113, but she also testified that she was willing and able to set aside her opinion and base a verdict solely upon the evidence. Transcript at 1113-1114. Yount's challenges for cause were denied in each instance.

None of these citizens sat in judgment of the facts because the accused exercised one of the twenty peremptory challenges provided by Pennsylvania law. In addition, no authority is required for the precept that the grant or denial of a challenge for cause is a discretionary function of the trial judge. Only when an accused is denied a fair and impartial tribunal is the Fourteenth Amendment implicated. We find no such violation here.

The decision of the judge to deny a cause challenge to Marie Richardson was proper. Physical capacity to

serve is a judicial decision and not one to be left to the judgment of an individual juror. The trial judge found that Richardson was capable of serving on a sequestered jury and we perceive no constitutional error in that ruling.

The denial of petitioner's challenges for cause as to Polkinghorn, Decker and Hudson did not violate the Fourteenth Amendment even if we may disagree with those rulings. First, the trial judge granted challenges for cause prior to and following the interrogation of these prospective jurors. See Transcript at 1161. Second, Yount retained additional peremptory challenges following the no cause rulings concerning all three prospective jurors. Third, petitioner exercised a peremptory challenge to Margaret Rokosky, Transcript at 1138, after he exercised a similar challenge as to Ruth Hudson. And fourth, the jurors and alternates who were seated after petitioner had exhausted his peremptory challenges met the test of *Murphy v. Florida*, 421 U.S. 794, 199-803, 95 S.Ct. 2031, 2035-2037, 44 L.Ed. 2d 652 (1974) and *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981). We hold that petitioner has failed to sustain his burden of proving the substantive elements of his claim.

In sum, we hold the petitioner, Jon Yount, has failed to establish that: (1) excessive and biased pretrial publicity prevented a fair trial; (2) substantial and undue community bias required a change of venue; and (3) the trial court erred when it denied several challenges for cause. Petitioner's exhausted state claims assail, in part, the factual findings of an experienced trial judge and an appellate jurist of renown. We find an absence of convincing evidence to contradict their findings and we fur-

ther hold, based on an independent review of the record, that petitioner has failed to establish that this state court judgment is violative of the Due Process Clause of the Fourteenth Amendment.

A written order will follow denying the petition for habeas relief with prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 81-234

JON E. YOUNT,

Petitioner,

vs.

EARNEST S. PATTON, Superintendent, SCI - Camp Hill,
and HARVEY BARTLE III, ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,

Respondents.

ORDER OF COURT

AND NOW, this 22nd day of April, 1982,

IN IS ORDERED that the petition of Jon E. Yount for writ of habeas corpus be and hereby is denied with prejudice.

(s) Donald E. Ziegler
Donald E. Ziegler

United States District Judge

Order, April 23, 1982

ORDER OF COURT
[Caption Omitted]

AND NOW, this 23rd day of April, 1982, it appearing that the issues presented are not frivolous,

IT IS ORDERED that a certificate of probable cause be and hereby is granted.

(s) Donald E. Ziegler
Donald E. Ziegler

United States District Judge

MOTION TO SUPPLEMENT THE RECORD

[Caption Omitted]

AND NOW comes the Petitioner, Jon E. Yount, by his attorney, George E. Schumacher, Federal Public Defender, and moves this Honorable Court to supplement the record with additional exhibits and as grounds therefor sets forth as follows:

1. A hearing was conducted before this Court on March 31, 1982 on the above case.

2. Prior and subsequent to the date of the hearing a number of newspaper articles appeared in newspapers of general circulation, especially in the Clearfield area and more particularly, The Courier Express. Copies of those articles are attached hereto as exhibits and made a part hereof by reference.

3. On May 12, 1982, a conference was held between the Federal Public Defender and the Petitioner at which time Yount called to the attention of his counsel those newspaper articles as well as additional newspaper articles encouraging readers to write to this Court concerning the prior recommendation of Magistrate Robert C. Mitchell recommending that he be granted a new trial.

4. Counsel is unaware of whether or not the Court has received any responses to the newspaper articles and as directed by his client, respectfully requests that an Order be entered that the attached newspaper articles, as well as any letters received by

the Court concerning this case, be filed of record for whatever purpose may be appropriate in the further appeal of this case.

Respectfully submitted,

(s) George E. Schumacher

George E. Schumacher

Federal Public Defender

Attorney for Petitioner

Jon E. Yount

COURIER EXPRESS 12/8/81

**JUDGES REILLY AND CHERRY INCLUDED
PROSECUTORS WILL TESTIFY AGAINST PETI-
TION BY YOUNT**

CLEARFIELD—Clearfield County's prosecutors will be in Pittsburgh Dec. 28 to present additional testimony in an effort to keep Jon Yount, formerly of DuBois, in prison where he is serving a life term for murder.

Accompanying them will be Clearfield County President Judge John K. Reilly Jr., former district attorney and Yount's prosecutor, and Senior Judge John A. Cherry, who presided at the 1966 and 1970 trials in which Yount was convicted of slaying his high school math student, Pamela Sue Rimer of Luthersburg.

The jurists will testify about the trials and the atmosphere surrounding them, the prosecutors said. Their appearance in U.S. District Court will be

another chapter in the county's opposition to Yount's petition for release.

The prosecutors will also take former sheriff William Charney of Houtzdale, a juror and media representatives, said District Attorney Thomas F. Morgan.

Yount, in his petition for habeas corpus filed in the federal district court, alleges prejudicial media accounts prevented him from receiving a fair trial.

At a Nov. 3 hearing in Pittsburgh, Homer King, of Pittsburgh, Yount's defense counsel, testified he stayed at the Dimeling Hotel in Clearfield during the trials and had to fight his way across the street to the courthouse "because of the thousands of people standing outside in the courthouse square," said Assistant District Attorney F. Cortz Bell III.

Mr. Yount's mother, Carolyn, also testified about news reports heard on the radio and the spectators at the trials. The courtroom was packed every day during the first, trial, she stated, and although less, the courtroom was crowded for the second trial, in 1970.

Yount also testified about the trials and Constance Ives, a daughter-in-law of one of the jurors, testified concerning jury selection.

Because of the testimony, District Attorney Morgan requested a continuation of the hearing to have additional testimony placed on the record, he said.

After testimony is completed, both sides will file written briefs, according to Mr. Bell.

Yount in his petition is claiming he was convicted unconstitutionally of the murder a second time because:

- He was not tried by an impartial jury.
- He was not allowed a change of venue from Clearfield County.
- The prosecutor used statements he gave police without prior notice of his constitutional rights.
- His defense counsel was incompetent.

Clearfield County prosecutors said it will take months for Federal Magistrate Robert C. Mitchell to make his recommendation to the court. If the petition is granted, Mitchell will recommend Yount be retried within a certain number of days, Bell said.

If the district court agrees, Mr. Bell said, the district attorney will appeal.

Yount was convicted in 1966 of

Please Turn to Page 2, Col. 3

PROSECUTORS...

(Continued from Page One)

first degree murder and rape in the stabbing death of the 18-year-old math student. In 1970, the rape charge was dropped, but the murder conviction was upheld.

Since his convictions, Yount has appealed eight times to the state board of pardons for release from prison and has been turned down each time. He is currently confined to the state correctional facility at Camp Hill.

THE COURIER EXPRESS—DECEMBER 29, 1981
YOUNT'S PLEA FOR FREEDOM DECISION DUE
BY FEBRUARY

PITTSBURGH (UPI)—A former Clearfield County school teacher serving a life sentence for the 1966 murder of a female student has asked U.S. Magistrate Robert C. Mitchell to free him from prison.

Jon E. Yount, 43, twice convicted of the slashing murder of 18-year-old Pamela Sue Rimer, claimed he has been unlawfully imprisoned for 15 years because he was not afforded a fair and impartial jury.

Yount also said he should be released because state police did not inform him of his rights against self-incrimination before he gave them an oral statement in which he admitted attacking Miss Rimer, a student at DuBois Area High School where he taught.

Yount also claimed Clearfield Common Pleas Judge John A. Cherry prejudiced the jury by giving erroneous instructions before allowing the panel to begin its deliberations.

Francis V. Sabino, counsel for Yount, Cherry and John K. Reilly, former Clearfield County district attorney and case prosecutor, presented testimony before Mitchell, who took the matter under advisement. He indicated he would issue a ruling by mid-February.

Any decision by Mitchell will be reviewed by U.S. District Judge Donald E. Ziegler.

Yount's seventh bid for parole was denied last year by the state Board of Pardons after Lavonne Rimer, the victim's mother, testified she would not feel safe if Yount were released. The Clearfield Coun-

ty district attorney's office also opposed a commutation of Yount's sentence.

Yount was initially convicted in April 1966 of first degree murder and rape. The state Supreme Court granted a retrial after Yount's attorney claimed Yount had not been informed of his right to free counsel before his first trial.

A second jury deliberated only 90 minutes before convicting Yount.

A-12 PITTSBURGH PRESS, THURS., FEB. 18, 1982
RETRIAL URGED FOR TEACHER IN SLAY CASE

By MARY STOLBERG

An ex-Clearfield County teacher who was convicted of murdering and raping his female student has won another legal victory in his fight for freedom.

A federal magistrate has recommended that Jon Yount either be released from prison or tried again in a different place for the 1966 slaying of Pamela Sue Rimer.

In requesting the new trial, Magistrate Robert Mitchell agreed with Yount, who said his previous trials have been tainted by unfavorable publicity in Clearfield County.

If U.S. District Judge Donald Ziegler approves Mitchell's suggestion, it would be the third trial in the case for Yount, who is serving a life sentence at the state prison at Camp Hill.

Yount was first tried and convicted of rape and murder in the fall of 1966, months after Miss Rimer's body was discovered in a wooded area near her home in Luthersburg.

Much of the evidence at the first trial centered on Yount's confession to state police the day after Miss Rimer's body was discovered. He walked into the state police barracks at DuBois and said "I'm the man you're looking for ... I hit her with a wrench and then I choked her."

After his first conviction Yount argued that his confession should never have been admitted at trial because police failed to tell him about his constitutional rights to remain silent.

He took his case to the state Supreme Court, which agreed with him, overturned the conviction and ordered a new trial. Yount was retried in 1970 in Clearfield County and was found guilty.

Yount said the second trial was prejudiced, like the first had been, with unfavorable and sensational publicity.

Although his confession was not allowed in the second trial, the media kept focusing on it, Young said. In such an atmosphere, the ex-teacher said, it was impossible to select a fair jury. Nevertheless, the judge refused to have the trial moved.

THE COURIER EXPRESS—FEBRUARY 19, 1982
RECOMMENDS NEW TRIAL FOR YOUNT OR
RELEASE

PITTSBURGH (UPI)—A federal magistrate has recommended a new trial or possible freedom for a former Clearfield County teacher convicted in the rape-slaying of one of his students in 1966.

U.S. Magistrate Robert Mitchell issued a recommendation that Jon Yount, currently serving a life sentence at the state prison at Camp Hill, either be granted a new trial or be released. Mitchell agreed with Yount that his two previous trials had been tainted by unfavorable publicity in Clearfield County.

The recommendation is being considered by U.S. District Judge Donald Ziegler.

Yount was tried and convicted twice in the death of teenager Pamela Sue Rimer, whose body was discovered in a wooded area near her home in Luthersburg.

After the first conviction, Yount argued his constitutional rights had been violated and his confession was inadmissible since police failed to inform him of his right to remain silent.

The case was appealed to the state Supreme Court which overturned the original conviction and ordered a new trial. Yount was retried in 1970 in Clearfield County and again was convicted.

Yount has since argued the second trial was prejudiced, due to unfavorable and sensational publicity. He said the media kept focusing on his confession,

which was not allowed in the second trial, and selection of a fair and impartial jury was impossible.

THE COURIER EXPRESS—FEBRUARY 22, 1982
DISTRICT ATTORNEY OBJECTING TO YOUNT
RECOMMENDATION

CLEARFIELD—The Clearfield County District Attorney's office is at work on objections to be filed in regards to a federal magistrate's recommendation of possible freedom for former DuBois High School math teacher Jon Yount, convicted of slaying one of his students in 1966.

U.S. Magistrate Robert Mitchell last week in Pittsburgh issued a recommendation that Yount, currently serving a life sentence at a state prison in Camp Hill, either be granted a new trial or be released.

Assistant District Attorney F. Cortez Bell III said the Commonwealth has 10 days to file objections to the magistrate's recommendation before the District Court makes its final determination.

The recommendation is being considered by U.S. District Judge Ziegler, who can adopt the magistrate's report, adopt the prosecution's objections, or set up hearings on his own, Mr. Bell stated.

Yount, a DuBois High School math teacher was tried and convicted twice in the death of 18-year-old Pamela Sue Rimer, whose body was discovered in a wooded area near her Luthersburg RD home.

The federal magistrate's recommendation stated that Yount should have been granted a change of

venue, agreeing that Yount's two previous trials had been tainted with unfavorable publicity in Clearfield County.

Yount has argued the second

Please Turn to Page 2, Col. 3

District Attorney...

(Continued from Page One)

trial in 1970 was prejudiced, due to unfavorable and sensational publicity. He alleged the media kept focusing on his confession, which was not allowed in the second trial, and selection of a fair and impartial jury was impossible.

Mr. Morgan said his office is taking exception to that. His office is taking the position that the change of venue wasn't required—that Yount could and did get a fair trial in the county.

If the federal judge finds in favor of Yount, Mr. Bell said, the district attorney will appeal the matter to the Third Circuit Court. Assistant District Attorney Bell was also of the opinion that Yount would appeal any decision not in his favor.

Morgan said he is of the opinion the loser then would ask the U.S. Supreme Court to take a look at it, and the Supreme Court grants about one out of 20 appeals.

He said it will be a fair amount of time before the matter is resolved.

Morgan noted a federal magistrate recommended a new trial for John Bishop of Osceola Mills, convicted

in 1976 of voluntary manslaughter in Clearfield County.

The federal district court agreed, but the decision was overturned by the Third Circuit Court, and the Supreme Court refused to review it.

THE COURIER-EXPRESS 9-22-82 Front Page
YOUNT PETITION ARGUMENT SLATED FOR
NEXT WEEK

PITTSBURGH—Argument has been scheduled in Pittsburgh this month on a petition for habeas corpus filed last year by Jon Yount, formerly of DuBois, a twice-convicted murderer.

The argument to be heard by U.S. District Judge Donald Ziegler is scheduled for March 31, according to Clearfield County Assistant District Attorney F. Cortez Bell III.

Judge Ziegler has not accepted the recommendation of District Magistrate Robert Mitchell to free Yount or give him a new trial, Mr. Bell said.

Mr. Yount was convicted of first degree murder in the 1966 rape-slaying of his high school a math student, Pamela Sue Rimer, 18 of Luthersburg. He appealed his conviction and was reconvicted in 1970.

In his current bid for freedom, Mr. Yount claims that sensational pre-trial publicity for the second trial made it impossible for him to have an impartial jury. He said the media kept focusing on his confession, which was not admissible in the second trial.

Mr. Yount should have been given a change of venue, according to Magistrate Mitchell's recommendation.

... given what they deserve and not be let off so easily.

— 0 —

This is the address of the Judge reviewing the case of Jon Yount: U.S. Dist. Judge Donald Ziegler, U.S. Post Office and Court House, Seventh and Grant St., Pittsburgh Pa., 15222.

Page 4 3-27-82

PEOPLE SPEAK
WHERE IS JUSTICE?

Dear Editor:

Hats off to Josephine Cerny of Coolspring! She cares enough about justice to spend a little time and thought working for it. She opposes any consideration for the release of Jon Yount. So do I.

Most people feel the same way, but most will do little in the way of protest to prevent it. It's easy not to become involved and leave things to the judgments of people like the magistrate (Mitchell) in Pittsburgh. Mitchell thinks Yount should have another trial. We have already had two, and Yount was found guilty both times. Mitchell doesn't care about costs. While important, the cost is the least important of the issue.

Mitchell claims Yount had bad publicity and wasn't treated fairly. What is his reasoning? Are we to

believe that anyone could expect good publicity from the horror story he created?

I attended the first trial of Jon Yount and I'll never forget the agony I witnessed in the face of Pamela Rimer's mother when her murdered daughter's clothing, offered as evidence, was dropped upon the table. The pathologist made his gruesome report. There was unbelievable silence in the courtroom.

This terrible crime happened within sight and safety of her own home.

Must this poor mother, who has suffered so greatly and so undeservedly, be endlessly subjected to another trial? Should she have to face another period of uncertainty while waiting for the decision of a Board of Pardons review? What has happened to justice?

U.S. District Judge Donald Ziegler will render his decision on the recommendation by Mitchell next Wednesday, March 31. You can express your concern by writing to him at the following address: U.S. District Judge Donald Ziegler, U.S. Postoffice & Courthouse, Seventh & Grant St., Pittsburgh Pa.

Pray that his decision will bring the long suffering mother peace.

James G. Meenan,
Punxsutawney

THE COURIER EXPRESS—APRIL 1, 1982

JUDGE HEARS YOUNT CASE ARGUMENTS

PITTSBURGH (UPI)—A federal court judge is considering granting parole or ordering a third trial for a former DuBois High School teacher twice convicted for a 1966 rape-slaying of one of his students.

U.S. District Court Judge Donald Ziegler heard arguments Wednesday by attorneys for Jon Yount and by Clearfield County District Attorney Thomas Morgan, who had filed objections to a District Magistrate's recommendation that Yount be retried or released.

Yount has been seeking release since his first conviction in the slaying of Pamela Sue Rimer, 18, found dead in an area near her home in Luthersburg, Clearfield County, 16 years ago. She was on her way home from school when she was slain, officials said.

Yount appealed his conviction in the case and won a second trial but was convicted a second time in 1970. He argued sensational publicity prior to the second trial hampered his chances for an impartial jury.

Yount filed writ of habeas corpus through U.S. District Magistrate Robert Mitchell.

A spokeswoman for Ziegler gave no indication as to when he might reach a decision.

**A-16 PITTSBURGH PRESS, THURS., APRIL 1, 1982
GIRL'S KILLER MAY BE GIVEN THIRD TRIAL**

By Mary Stolberg

A federal judge is considering whether to order a third trial for a former Clearfield County teacher who has been convicted twice already for killing a female student in 1966.

During a hearing yesterday, U.S. District Judge Donald Ziegler said he has begun working on Jon Yount's case but didn't know when he would file an opinion.

Yount, 43, who claims both his trials were unfair has waged a lengthy court battle to gain his freedom from the state prison at Camp Hill, where he is serving a life term.

Yount says he has been illegally imprisoned for the 15 years since he was first found guilty of raping and murdering Pamela Sue Rimer, an 18-year-old student in the fall of 1966.

Much of the prosecution's evidence in the first trial surrounded Yount's alleged confession to police the day after the murder.

Yount turned himself in at the police station and allegedly told police "I hit her with a wrench and then I choked her."

Yount argued his confession should never have been admitted at the trial because police didn't tell him about his constitutional right to remain silent.

He took his case to the state Supreme Court, which agreed with him, and overturned the convic-

tion. He was retried in Clearfield County in 1970 and again was found guilty.

He claims the second trial was prejudiced by unfavorable publicity which included repeated references to his confession.

Yount claims he should be either set free or given a new trial because his constitutional rights were violated.

Earlier this year U.S. Magistrate Robert C. Mitchell agreed with him. Mitchell said Yount provided more than enough evidence to show that his second trial was not fair because it was held in the prejudicial atmosphere of Clearfield County.

The magistrate wrote an opinion saying Yount should be let go or retried in a different part of the state where a fair-minded jury could be chosen.

Mitchell submitted his findings to Ziegler who must now decide.

During yesterday's hearing, Yount did not appear. He was represented by attorney George Schumacher, who told Ziegler the trial transcript was replete with evidence of the vindictive atmosphere surrounding Yount's second trial.

Schumacher said it was apparent that people vied to get on the jury so they could "hang the guy (Yount) again."

Shumacher said of the 12 jurors that decided the case, nine said they thought Yount was guilty before the trial began.

But F. Cortez Bell III, an assistant district attorney in Clearfield County said those nine jurors also said they thought they could still decide his case fairly.

Bell also said that although Yount's second trial received publicity, there are only two newspapers in Clearfield County and the jury was sequestered during the four days of trial and deliberations so it couldn't read articles about the case.

THE COURIER EXPRESS—APRIL 23, 1982

YOUNT DENIED THIRD TRIAL

PITTSBURGH (UPI)—A federal judge Thursday denied a third trial for a former Clearfield County teacher twice convicted for the 1966 slaying of a female student.

U.S. District Judge Donald Ziegler ruled there was insufficient evidence to support Jon Yount's claim his two trials were invalidated by adverse publicity and unfair jurors.

Yount, 43 convicted in the bludgeon slaying of Pamela Sue Rimer, has been trying to win freedom through the courts while serving a life sentence at a prison in Camp Hill near Harrisburg.

He appealed his first conviction to the state Supreme Court on grounds a confession he gave police never should have been admitted at his trial because he was not informed of his constitutional right to remain silent. The court agreed and ordered a new trial, which was held in 1970 and which also ended in his conviction.

*Motion To Supplement Record
Order, May 21, 1982*

Ziegler rejected the contention about bad publicity, noting the media in Clearfield County gave "balanced and accurate" coverage of the second trial. The judge also ruled jurors were not biased and were able to drop any preconceived notions on the case.

Ziegler's ruling overturned a proposal by a federal magistrate who considered Yount's case last month.

[Certificate of Service Omitted]

ORDER OF COURT
[Caption Omitted]

AND NOW, to-wit, this 21st day of May, 1982, upon consideration of the within Motion to Supplement the Record, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that those articles appearing in newspapers of general circulation prior and subsequent to the March 31, 1982 hearing be made a part of the record of this case.

IT IS FURTHER ORDERED any and all correspondence received by the Court also be made a part of the record of this case.

(s) Donald E. Ziegler
United States District Judge

ANSWER TO MOTION TO SUPPLEMENT THE
RECORD
[Caption Omitted]

NOW, comes the Respondents, by and through F. Cortez Bell, III, Esquire, Assistant District Attorney of Clearfield County, and respectfully sets forth their Answer in regard to Petitioner's Motion to Supplement the Record as follows:

1. Jon E. Yount presented a Petition for Writ of Habeas alleging that his conviction was obtained in violation of his Constitutional right to select and empanel a fair and impartial jury.

2. Following evidentiary hearing and the submission of briefs before Magistrate Robert Mitchell, the Magistrate filed a Report and Recommendation on or about February 12, 1982, whereby it was recommended that the Petition for Writ of Habeas Corpus be granted and that Petitioner be discharged within sixty days unless the Commonwealth retries him.

3. That on April 22, 1982, the Honorable Donald E. Ziegler, United States District Judge, issued an Order and Opinion by which the Petition for Writ of Habeas Corpus was denied with prejudice. On April 23, 1982, Judge Ziegler further issued an Order granting a Certificate of Probable Cause with regard to the Petition.

4. That it is alleged by Petitioner that during the course of hearings and conferences before the

District Court there appeared in newspapers of general circulation within the Clearfield County area various news articles with regard to proceedings in the case. Petitioner by his Motion requests that said newspaper articles and any correspondence received by the Court concerning this case be filed of record for whatever purpose may be appropriate in the further appeal of this case.

5. That Respondents by this Answer would object to the filing of said items, in that the said newspaper articles and correspondence, if any, are irrelevant and immaterial to the issues asserted in the Petition for Writ of Habeas Corpus. Respondents would further aver that the Petition for Writ of Habeas Corpus deals solely with whether the Petitioner's rights were violated at the time of his arrest and during the jury selection before trial. Any newspaper articles appearing in the press at this time have no relevance to Petitioner's claims which are adequately supported by exhibits which have already been introduced at previous hearings before the Magistrate and the Court.

WHEREFORE, it is respectfully requested that the Court issue an Order denying Petitioner's Motion to Supplement the Record on the basis that said items are irrelevant and immaterial to the allegations raised in Petitioner's Petition for Writ of Habeas Corpus.

Respectfully Submitted,

(s) F. Cortez Bell III

F. Cortez Bell, III, Esquire

Assistant District Attorney

[Affidavit and Certificate of Service Omitted]

ORDER OF COURT
[Caption Omitted]

AND NOW, to wit, this 21st day of June, 1982, upon consideration of the Petitioner's Motion to Supplement the Record and the Respondents Answer thereto, it is hereby ORDERED, ADJUDGED AND DECREED that the Petitioner's request that the record in this matter be supplemented by the addition of articles appearing in newspapers of general circulation prior and subsequent to the March 31, 1982 hearing in this matter be and hereby is granted.

(s) Donald E. Ziegler
United States Judge

NOTICE OF APPEAL
[Caption Omitted]

Notice is hereby given that the petitioner, Jon E. Yount, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the Hon. Donald E. Ziegler dated April 22, 1982, denying his petition for writ of habeas corpus.

Dated: May 21, 1982

(s) George E. Schumacher
George E. Schumacher
Federal Public Defender
Attorney for Petitioner,
Jon E. Yount.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-5372

JON E. YOUNT, *Appellant*

v.

ERNEST S. PATTON, SUPERINTENDENT, SCI —
CAMP HILL, and HARVEY BARTLE III, ATTORNEY
GENERAL OF THE COMMONWEALTH OF PENN-
SYLVANIA, *Appellees*

*Appeal From the United States District Court for the West-
ern District of Pennsylvania—Pittsburgh*

D.C. Civil No. 81-234

Argued December 17, 1982

Before: HUNTER, GARTH, *Circuit Judges* and STERN,*
District Judge

*Opinion filed May 10, 1983***

* Honorable Herbert J. Stern, United States District Judge
for the District of New Jersey, sitting by designation.

** Due to illness, Judge Garth separately filed his opinion
concurring in the judgment on June 10, 1983.

834a

Opinion, Court of Appeals

George E. Schumacher (Argued)

Federal Public Defender

590 Centre City Tower

650 Smithfield Street

Pittsburgh, PA 15222

Attorney for Appellant

F. Cortez Bell, III (Argued)

Assistant District Attorney

Thomas F. Morgan

District Attorney

Office of the District Attorney

P.O. Box 887

Clearfield, PA 16830

Attorneys for Appellees

OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. Petitioner Jon E. Yount was convicted in 1966 of first degree murder and rape in the Court of Oyer and Terminer and General Jail Delivery of Clearfield County, Pennsylvania. On direct appeal the Pennsylvania Supreme Court determined that petitioner had not received adequate warnings against self-incrimination. It reversed the judgment of sentence and granted a new trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925 (1970) ("*Yount I*"). After a retrial before the same court, petitioner was convicted of first degree murder and was again sentenced to life imprisonment. The Pennsylvania Supreme Court on direct appeal affirmed the judgment of sentence. *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974) ("*Yount II*").

2. In 1981 petitioner filed a petition for a writ of habeas corpus in United States District Court.¹ Petitioner alleged, *inter alia*, that his conviction had been obtained in violation of his fifth and fourteenth amendment privilege against self-incrimination and his sixth and fourteenth amendment right to a fair trial by an impartial jury.² The

¹ The petition was initially filed in the Middle District of Pennsylvania, but was transferred to the Western District of Pennsylvania pursuant to 28 U.S.C. §2241(d) (1976).

² None of petitioner's other allegations are before us. Petitioner does not appeal the district court's rejection of his challenges to the trial court's instructions on the degrees of homicide and on the murder weapon. *See Yount v. Patton*, 537 F. Supp. 873, 875 (W.D. Pa. 1982); app. at 134a. All other claims by petitioner, including his attack on the use of character evidence at trial, his allegation of a prejudicial charge by the court, and his claim of ineffective assistance of counsel, were deleted on petition-

federal magistrate concluded that petitioner's privilege against self-incrimination had not been violated, but recommended that the petition be granted because petitioner had been denied a fair and impartial jury. App. at 124a-41a. The district court agreed on the former issue, rejected the magistrate's recommendation on the latter issue, and denied the petition. *Yount v. Patton*, 537 F. Supp. 873 (W.D. Pa. 1982).

3. We agree with the district court that petitioner's privilege against self-incrimination was not infringed. We conclude, however, that the petitioner's right to trial by a fair and impartial jury was violated. We will therefore remand that portion of the case to the district court.

I. SELF-INCRIMINATION

A. Facts³

4. During the early evening of April 28, 1966, the body of Pamela Rimer, an 18-year old high school student, was found in a wooded area near her home in Luthersburg, Clearfield County. There were numerous wounds about her head, apparently caused by a blunt instrument. There were also cuts caused by a sharp instrument on her throat and neck. One of her stockings was knotted and tied

er's motion after the district court determined that the claims had not been presented to the courts of Pennsylvania for their initial consideration. See 537 F. Supp. at 874-75; see app. at 126a-27a, 154a.

³ The federal magistrate adopted the statement of the facts given in the opinion of the Pennsylvania Supreme Court in *Yount II*, 455 Pa. at 306-08, 314 A.2d at 244-45. App. at 128a. We too adopt that statement. In addition we on occasion cite directly to the record for certain details omitted in the supreme court's summary. Unless otherwise noted, those details are undisputed.

around her neck. An autopsy showed that she had died of strangulation when blood from the throat and neck wounds was drawn into the lungs. Except for her stocking and shoe she remained fully clothed. The autopsy revealed no indication that she had been sexually assaulted.

5. Neighbors gave state police a description of a station wagon which they had seen at approximately the time and place at which the body was found. *E.g.*, Testimony of trial beginning November 17, 1970, at 143-48 ("T.T."). Sometime after two o'clock on the morning of April 29, 1966, state policemen learned that petitioner, the victim's high school mathematics teacher, had on prior occasions been seen in a station wagon fitting that description. T.T. at 290-93; Transcript of Proceedings—August 17, 1970, at 17-18, 20-21 ("T.P.").

6. At approximately 5:45 that morning, petitioner voluntarily appeared at the State Police Substation in Du-Bois, Clearfield County. The occupants of the substation had participated in the investigation of the Rimer homicide, T.T. at 198-201, 203-05, 255-56, but had gone to sleep unaware of any link between the homicide and petitioner or his vehicle. T.T. at 275, 277; T.P. at 13, 20.⁴

⁴ Petitioner asserts that before he came to the substation, the state policemen there knew that he and his vehicle had been linked to the scene of the crime. Appellant's Brief at 33. The trial court found, however, that when petitioner appeared at the substation "there was no knowledge on the part of the Police [at the substation] that he 'was the one they were looking for.'" App. at 754a. The Pennsylvania Supreme Court stated that the state policemen who had discovered that petitioner's automobile fit the neighbors' description had been working entirely separately and in a different location. *Yount II*, 455 Pa. at 309-10, 314, 314 A.2d at 246, 248.

Petitioner rang the doorbell. A trooper awoke, opened the door and asked whether he could be of assistance. Petitioner stated, "I am the man you are looking for." The trooper asked petitioner to repeat what he had said, app. at 11a; T.T. at 250-51, and then asked whether petitioner was referring to "the incident in Luthersburg." Petitioner said yes. The trooper then asked petitioner to come in and be seated.

7. Leaving petitioner unattended, the trooper went to a back bedroom and roused a detective and a second trooper. The first trooper informed them that "there was a man in the front that said we are looking for him" in connection with the Luthersburg incident. *See* T.T. at 276; T.P. at 6. The first trooper then returned to the front office where petitioner had removed his coat, hat and gloves. The trooper asked petitioner for his identification. Petitioner gave the trooper his wallet, which the trooper returned after removing petitioner's automobile operator's license. T.T. at 252.

8. Shortly thereafter, the detective and the second trooper entered the front office. The detective was handed petitioner's license and learned that petitioner was Jon Yount. App. at 12a; T.T. at 259, 262-63, 271. The detective requested that petitioner be seated inside a smaller adjacent office, and gave petitioner something to eat. *See Yount I*, 435 Pa. at 278, 256 A.2d at 465; T.P. at 15. The detective asked, "Why are we looking for you?" Petitioner replied, "I killed that girl." Upon hearing that answer, the detective inquired, "What girl?", and petitioner responded, "Pamela Rimer."

9. The detective then asked, "How did you kill this girl?" Petitioner answered, "I struck her with a wrench

and I choked her." At that time the detective undertook to advise petitioner of his rights. The detective, however, failed to tell petitioner of his right to court-appointed counsel if he could not afford his own attorney. The detective then conducted an interrogation regarding the details of the crime. At some point the second trooper searched petitioner and confiscated his penknife. T.T. at 265-66, 267-68, 272-73.⁵ Petitioner gave his first written confession to the detective. Later the district attorney, after giving similarly inadequate warnings, questioned petitioner and obtained another written confession.

B. State Proceedings and Proceedings Below

10. Before the first trial petitioner moved to suppress his statements and confessions as violative of *Miranda v. Arizona*, 384 U.S. 436 (1966). After a hearing the motion was denied. The petitioner's statements and confessions were admitted in the first trial over petitioner's objections.

11. The Pennsylvania Supreme Court held that the warnings given by the detective and district attorney were inadequate under *Miranda*. *Yount I*, 435 Pa. at 279, 256 A.2d at 465 (Roberts, J., plurality opinion). The court rejected the Commonwealth's argument that the confessions were volunteered. "After indicating a willingness to talk, [petitioner] was *interrogated* about details of the

⁵ Petitioner argues that the state police searched him and confiscated his penknife *before* the detective asked, "Why are we looking for you?" Appellant's Brief at 32. Although there have been no explicit factual findings as to when the search occurred, petitioner's assertion has been implicitly rejected in the factual findings and holding of the state trial court and the district court, and is not fairly supported by the record.

crime, and his formal confession followed." 435 Pa. at 279-80, 256 A.2d at 465 (emphasis in original); see 435 Pa. at 281, 256 A.2d at 468 (Jones, C.J., concurring). The court found the confessions invalid and granted a new trial. 435 Pa. at 281, 256 A.2d at 466.

12. Prior to the second trial petitioner requested that his oral and written statements be suppressed. The trial court on the authority of *Yount I* suppressed the written confessions, as well as the question "How did you kill this girl?" and its answer. The trial court ruled, however, that petitioner's statement "I killed that girl" and his identification of "that girl" as "Pamela Rimer" were admissible under *Yount I*. App. at 748a, 755a. It concluded that petitioner's statements were made before petitioner was in custody. App. at 755a.

13. On appeal the Pennsylvania Supreme Court did not determine whether petitioner was in "custody" when he made the statements to the detective. *Yount II*, 455 Pa. at 311 n.4, 314 A.2d at 247 n.4. Instead it ruled that the statements were volunteered and not the product of interrogation. The court said that the detective's first question, "Why are we looking for you?", was simply an extemporaneous response "of neutral character." 455 Pa. at 310, 314 A.2d at 246. In the court's view the detective's question "What girl?" after petitioner had responded, "I killed that girl," was merely "a clarifying inquiry." *Id.* The supreme court therefore concluded that the questions were not calculated, expected or likely to elicit an incriminating response. 455 Pa. at 309, 314 A.2d at 246.

14. In his petition for a writ of habeas corpus, petitioner again argued that his fifth and fourteenth amendment privilege against self-incrimination had been violated

by the admission of his responses to the detective's questions. The magistrate ruled that the responses were properly admitted because only after those responses, when "the police recognized that petitioner was present to confess his participation in a crime, did his presence become custodial." App. at 132a. The magistrate did not consider whether the questions constituted interrogation. The district court adopted the magistrate's findings. 537 F. Supp. at 875.

C. Discussion

15. *Miranda* held that unless the government has advised a defendant of his rights, it cannot put into evidence statements stemming from the "custodial interrogation" of the defendant. 384 U.S. at 444. The Supreme Court defined "custodial interrogation" to mean

questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Id. (note omitted).

16. Petitioner argues on appeal that his statements "I killed that girl" and "Pamela Rimer" must be excluded as the products of custodial interrogation. He contends that the detective's questions constituted "interrogation," and asserts that the state policemen would not have allowed him to leave the substation when the questions were posed. We need not consider whether the questions "Why are we looking for you?" and "What girl?" constituted interrogation under *Miranda* because we conclude that petitioner was not in "custody" until after he had answered those questions. See *Beckwith v. United States*, 425 U.S.

341, 345-46 (1976); *United States v. Mesa*, 638 F.2d 582, 588 (3d Cir. 1980) (opinion of Seitz, C.J.).

17. To determine whether an individual is in custody, we use the "objective test of whether the 'government has in some meaningful way imposed restraints on [a person's] freedom of action.'" *Steigler v. Anderson*, 496 F.2d 793, 798 (3d Cir. (quoting *United States v. Jaskiewicz*, 433 F.2d 415, 419 (3d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971))), *cert. denied*, 419 U.S. 1002 (1974). Where, as here, the individual has not been openly arrested when the statements are made,

something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart.

Id. at 799 (quoting *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970)); accord *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam); see *Mesa*, 638 F.2d at 587 n.4 (opinion of Seitz, C.J.). When the questioning occurs in a police station we must scrutinize the circumstances surrounding the statements with extreme care for any taint of psychological compulsion or intimidation. *Steigler*, 496 F.2d at 799.

18. In making our determination, we are mindful of the Supreme Court's caution that "custody" must not be read too broadly:

[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.

Mathiason, 429 U.S. at 495; *accord Steigler*, 496 F.2d at 799. In particular we note the Court's statement in *Miranda*:

There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statements he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

384 U.S. at 478 (note omitted).

19. Petitioner came voluntarily and on his own initiative to the substation. The state police did not know why he was there. The first trooper left petitioner unattended while petitioner on his own accord removed his outer clothing. The detective testified that before he posed the questions he would have returned petitioner's operator's license and allowed him to leave had petitioner so requested. T.P. at 15-16. On this record we have no difficulty in concluding that petitioner was not in custody when the detective asked, "Why are we looking for you?" *Sullivan v. Alabama*, 666 F.2d 478, 482 (11th Cir. 1982); *see Mathiason*, 429 U.S. at 495; *Orozco v. Texas*, 394 U.S. 324, 325 (1969); *Barfield v. Alabama*, 552 F.2d 1114, 1118 (5th Cir. 1977). The admission of petitioner's response to that question therefore did not violate his fifth and fourteenth amendment privilege against self-incrimination.

20. Petitioner's response, "I killed that girl," was obviously highly incriminating. Although such an incriminating response undoubtedly heightened the detective's suspicion, it is police compulsion, and not the strength of

police suspicions, which places a suspect in custody. See *Beckwith*, 425 U.S. at 346-47.

The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda*. . . . But this is simply one circumstance, to be weighed with all the others.

Steigler, 496 F.2d at 799-800 (quoting *Hall*, 421 F.2d at 545).

21. The detective testified that petitioner remained free to leave the substation when the detective asked, "What girl?" T.P. at 5. The detective explained that only after petitioner gave the name of the girl and how he had killed her could the detective determine that the petitioner was not merely seeking personal aggrandizement by confessing to a sensational crime in which he had no part. T.P. at 3-4. Petitioner, on the other hand, does not allege that the state police did "anything different" after he had stated, "I killed that girl." See Brief for Petitioner on Petition for Writ of Habeas Corpus at 19-20, 22-23 ("Brief for Petitioner"). Instead petitioner takes the position that he was in custody from the moment he identified himself, and that "either all the statements were voluntary or all were involuntary." *Id.* at 19; see Appellant's Brief at 33. In addition, we can find no evidence that the detective at that juncture used any additional "force or intimidation, physical or psychological, actual or implied," *Government of Virgin Islands v. Berne*, 412 F.2d 1055, 1060 (3d Cir.), cert. denied, 396 U.S. 837 (1969).

22. Both the state trial court and the federal magistrate concluded that petitioner was not in custody until he responded, "Pamela Rimer." The district court agreed.

After examining the peculiar factual circumstances of this case we cannot conclude that the district court erred. We therefore hold that petitioner's privilege against self-incrimination was not violated by the admission of his statements "I killed that girl" and "Pamela Rimer."

II. FAIR AND IMPARTIAL JURY

A. *Facts and State Proceedings*

23. Clearfield County is a rural county with a population of approximately seventy thousand served by two newspapers with a total circulation of approximately twenty-five thousand. On April 29, 1966, each of the newspapers devoted its front page to the Rimer homicide and to petitioner's appearance at the substation. Both newspapers gave front-page coverage to the pre-trial proceedings, the voir dire of 104 veniremen, and the nine-day trial. In the *Dubois Courier Express* the publicity culminated in seventeen consecutive editions each bearing banner headlines and carrying at least two feature articles. The *Clearfield Progress* gave the case similarly intense coverage. As the papers related, public interest in the proceedings was unprecedented; *The Progress* later adjudged petitioner's trial the top news item of 1966.⁶

24. The coverage was as detailed as it was extensive, *see app.* at 135a, 136a. The newspapers related in full petitioner's detailed written confessions as well as his testimony at trial retelling the homicide. They also detailed petitioner's defense of temporary insanity, the charge and evidence of rape, and finally petitioner's conviction on October 7, 1966, of both rape and first-degree murder.

⁶ The case also received publicity in radio and television broadcasts, as well as in out-of-state and national publications.

25. Petitioner's cause continued to receive front-page coverage at every step of his appeal. Banner headlines announced the reversal of the conviction in *Yount I*. The dissent was reprinted in full, and a local radio program became a forum in which callers expressed their hostility to petitioner. As the second trial approached, newspaper coverage increased. The selection of each juror merited an article and often a profile. By the close of voir dire the two newspapers had printed sixty-six front-page articles on the appeal and retrial.⁷

26. Petitioner was returned to Clearfield for retrial before the same judge. On May 5, 1970, petitioner requested a change of venue. He claimed that the publicity which had saturated the county since the murder, and the continuing discussion of the case among residents, made a fair trial in Clearfield County impossible. In particular, petitioner alleged that the dissemination of prejudicial information outside of evidence was so widespread that it could not be eradicated from the minds of potential jurors. The prosecution argued in response that the case had received so much publicity across the state that it would be useless to change the venue. The trial court found that after the initiation of the appeal the newspapers had merely publicized the actions of the courts "without editorial comment of any kind." App. at 748a-49a. It denied the petition for change of venue on September 12, 1970.

⁷ Petitioner's second trial and his subsequent efforts to gain retrial or parole also received front-page coverage. Those efforts have provoked substantial community protests in Clearfield County. App. at 137a & n. 16. The magistrate found that even "at this late date, fifteen years after the crime, there is considerable public feeling in Clearfield County in opposition to the petitioner." App. at 136a-37a

27. Jury selection began on November 4, 1970, and took ten days, seven jury panels, 292 veniremen and 1186 pages of testimony. One hundred and twenty-five of the 292 veniremen were excused because they had not been chosen properly. Four others were dismissed for cause before they were questioned on the case. Of the 163 remaining venirement who were questioned, all but two had read of the case in the newspapers, had heard about it on radio or television, or were otherwise familiar with it. *See app. at 135a, 137a.* When asked whether they had discussed the case, had heard it discussed, or had heard others express their opinion as to petitioner's guilt or innocence, over ninety percent said that they had. *See app. 135a, 137a.*⁸

28. Of the 163 veniremen questioned on the case, 121 were dismissed for cause.⁹ Ninety-six of those 121 veniremen were successfully challenged after they testified that they had firm and fixed opinions¹⁰ which could not be changed regardless of what evidence was presented. *See app. at 135a & n.13.*¹¹ An additional 21 of the 121 venire-

⁸ Ninety-six veniremen were asked, and 88 responded affirmatively.

⁹ Petitioner made 114 successful challenges, the prosecution seven.

¹⁰ After objection by respondent, petitioner was not permitted to ask each venireman what his opinion was. *See Transcript of Trial—Voir Dire at 86; Brief for Appellee at 13; Brief for Petitioner at 27-28.* Many veniremen nonetheless volunteered that they thought petitioner was guilty because he had confessed to the crime or because he had been convicted in the first trial. Other veniremen remembered hearing members of the public express the opinion that petitioner was guilty. No venireman said he thought petitioner was not guilty.

¹¹ Petitioner challenged 90 of those 96 veniremen. The prosecution challenged the remaining six.

men were dismissed for cause after they said that they had an opinion which they could change only if the petitioner could convince them to do so. *See app. at 135a-36a & nn. 14, 15.*¹² Thus 117 out of the 163 veniremen questioned were successfully challenged for cause after they said they could not set their opinion aside before entering the jury box.

29. There were also nine other veniremen, unsuccessfully challenged for cause by petitioner, who indicated that they had an opinion which they could change only if the petitioner could convince them to do so.¹³ When we combine those nine with the 117 veniremen dismissed for cause, we find that a total of 126 out of the 163 veniremen questioned on the case were willing to admit on voir dire that they would carry their opinion into the jury box.¹⁴

30. Voir dire gave other indications of the depth of community sentiment. One veniremen, the wife of a minister, testified that she had heard too many opinions to be sure of her own. She was then asked:

Q. Would your presence in serving as a juror create a difficulty in your parish?

A. Why yes—when people heard my name was on for this—countless people of the church have come

¹² Petitioner successfully challenged all 21 veniremen.

¹³ Petitioner peremptorily challenged six of those nine veniremen, one was seated as a juror, and the remaining two were seated as alternates after petitioner had exhausted his peremptory challenges.

¹⁴ In addition, we note that twelve other veniremen stated that they had had an opinion at one time but claimed they would not carry it into the jury box. One of the twelve veniremen was dismissed for cause, six were peremptorily challenged by petitioner, and five were seated as jurors.

to me and said they hoped I would take—the stand I would take in case I was called. I have had a prejudice built up from the people in the church.

Q. Is this prejudice, has it been adverse to Mr. Yount?

A. Yes it was. They all say he had a fair trial and he got a fair sentence. He's lucky he didn't get the chair.

* * *

[T]he church people—I haven't asked for any of this but they discuss it in every group—but they say now since you are chosen and you will be there we expect you to follow through.

Q. Notwithstanding what the court would tell you, you feel you would be subject to the retributions or retaliation of these people—

A. I think I would hear about it.

App. at 410a, 412a. Another prospective juror said that his opinion had been erased by the passage of time, but his daughter-in-law later testified that he had left for jury duty voicing great animosity toward petitioner. App. at 430a, 527a-28a.

31. After the first jury panel was exhausted, petitioner again moved for a change of venue. Although more than three quarters of the veniremen already questioned had admitted that they would carry an opinion into the jury box, the court orally denied the motion. On November 14, 1970, the trial court rejected petitioner's written motion for a change of venue. In its memorandum opinion, the trial court explained that the still-incomplete voir dire had taken so much time and covered so many venire-

men because the court had been lenient in permitting extended examination of prospective jurors and in granting challenges for cause. App. at 194a-95a. It said that "almost all, if not all, jurors seated had no prior or present fixed opinions." App. at 196a. The court noted

that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there has been little, if any, talk in public concerning the trial from that time to the time when it was announced that a trial date had been fixed.

Id. The trial judge found the publicity was not unfair to the petitioner. App. at 197a. He added that few spectators had attended voir dire, which he took as some indication "particularly in a community as small as ours" that the publicity had not had a great effect. *Id.*

32. In fact the publicity had reached all but one of the twelve jurors and two alternates finally empanelled.¹⁵ Juror No. 1 said that he had read about the case and heard others express their opinions, but had never come to a "true" opinion. App. at 202a-04a, 207a. Juror No. 2 testified that he had recently discussed the case with others and had formed an opinion which was not firm and fixed and could be set aside. App. at 212a-15a, 218a-19a. The next

¹⁵ Juror No. 1 stated that "it was pretty hard to be here in Clearfield County and not read something in the paper." App. at 202a. Juror No. 2 said that "[y]ou could hardly miss it" on the radio and television news. App. at 212a. Juror No. 6 vounteered that "[i]t's rather difficult to live in DuBois and get the paper and find out what the people are talking about—at least the local people without having some opinion or at least reserving some opinion." App. at 275a-76a. Several potential jurors gave similar appraisals of the publicity's effect.

of the jurors to be selected, Juror No. 4,¹⁶ had recently moved into Clearfield County and had never heard about the case. App. at 246a-52a. Juror No. 5 said that she "remembered that they had said he was guilty before" and wondered why petitioner was getting a new trial, but had no opinion and would try to forget what she knew. App. at 259a-63a.

33. Juror No. 6, James F. Hrin, testified that he had an opinion. He was then asked:

Q. Would you be able to change your mind regarding your opinion before becoming a juror in this case. That's the way I must have you answer the question.

A. If the facts were so presented I definitely could change my mind.

Q. Would you say you could enter the jury box presuming him to be innocent?

A. It would be rather difficult for me to answer.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the Judge?

A. That I could do.

* * *

Q. Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?

¹⁶ The venireman initially selected as Juror No. 3 was later excused for personal reasons.

A. Definitely. If the facts show a difference from what I had originally had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind—is that your position?

A. Well—I have nothing else to go on.

App. at 271a-73a. After repeatedly reiterating that he would need evidence to change his opinion, Juror Hrin said, "I don't know if that's the answer you want." App. at 275a. Finally when asked yet again whether he could set his opinion aside, he replied, "I have to." App. at 276a. The court denied petitioner's challenge for cause, app. at 274a-75a, and petitioner did not exercise a peremptory challenge.

34. Juror No. 7 said that he had formed an opinion but added that he was not sure that he still had an opinion or that he could forget what he knew. App. at 285a-88a, 298a-99a. Juror No. 8 had heard others discussing the case and had had an opinion. App. at 304a-05a. She testified that she had none at present except "what he said himself—that he was guilty." App. at 309a-10a. She then said that she did not think she would consider in deliberations what she already knew. App. at 312a-13a. Juror No. 9 said that she had thought petitioner was guilty and wondered why a new trial was necessary, but added that now she would have to hear both sides before she could decide. App. at 322a-24a. Juror No. 10 had heard the opinions of others and had expressed his own. He admitted that it would be difficult to strike what he'd heard before, but stated that he felt petitioner should "have every opportunity to prove his innocence." App. at 336a, 338a-39a.

Juror No. 11 testified that he had read about the case but had not formed an opinion. App. at 347a, 349a, 357a.¹⁷

35. After petitioner had exhausted his peremptory challenges, two jurors and two alternates were seated over his challenges for cause. Both Juror No. 12 and replacement Juror No. 3 testified that they had heard about the case but had no opinion. App. at 362a-65a, 224a-28a. Alternate No. 1 stated that he had expressed an opinion which remained firm and fixed and which he would not put out of his mind until evidence was presented. App. at 380a-85a. Alternate No. 2 said that she had a definite opinion which she could not dismiss and which only evidence could change. App. at 395a-97a. Both alternates were sequestered with the jury; the jurors were told that they were free to discuss the case with other jurors when sequestered.

36. The trial lasted for four days. The prosecution presented quite a different case than it had at the first trial. Because of the Pennsylvania Supreme Court's holding in *Yount I*, the Commonwealth was unable to put into evidence petitioner's detailed written confessions. As a result, it chose not to retry petitioner on the rape charge. See 537 F. Supp. at 877.

37. The change in the defense was even more marked. Petitioner did not take the stand to retell and ex-

¹⁷ Petitioner did not challenge Jurors Nos. 1, 2, 4, 5, and 7-11. At the hearing on the habeas petition, petitioner explained that, because he had believed that a change of venue would not be granted and that a fair and impartial jury was impossible in Clearfield County, he had felt the jurors were "probably about as good as we are going to get." App. at 557a-58a; see Appellant's Brief at 16-17.

plain the events revealed in the now-excluded confessions. He did not renew his claim of temporary insanity. Instead petitioner relied solely upon cross-examination and character witnesses.

38. After he was again sentenced to life imprisonment, petitioner filed a post-conviction motion for a new trial on November 27, 1970. He claimed, *inter alia*, that the trial court erred in rejecting several of his challenges for cause and in denying his petitions for a change of venue. The trial court rejected those arguments and dismissed the motion on January 15, 1973. It stated that there had been "practically no publicity" during the four years between trial and retrial, and "practically no public interest" shown at the second trial as few had attended on some days. App. at 751a. Voir dire had taken such a long time, it explained, because petitioner "raised so many questions and the court exercised its discretion to assure that there could be no complaint about the final jury empaneled." *Id.*

39. The Pennsylvania Supreme Court adopted the trial court's post-conviction findings and affirmed the judgment of sentence on January 24, 1974. *Yount II*, 455 Pa. at 311-12, 314 A.2d at 247. It ruled that the petitions for a change of venue were directed to the second discretion of the trial court, and found no abuse of that discretion because "the record fails to disclose undue community prejudice." *Id.*, 455 Pa. at 312-14, 314 A.2d at 247-48.

B. *Proceedings Below*

40. In his petition for a writ of habeas corpus, petitioner claimed that his conviction was obtained in violation of his right to a fair, impartial, and "indifferent" jury.

In particular, he alleged that the trial court erred by refusing his motions for a change of venue.¹⁸

41. After two days of evidentiary hearings, the United States Magistrate recommended that the petition be granted. He noted that the case involved a sensational homicide in a small rural community and that extensive publicity had surrounded both trials. App. at 136a, 141a. He found "a strong community hostility toward the petitioner" as well as "pervasive community knowledge of the facts of the case." *Id.* at 141a. He characterized this case as one where

the public has been fully informed of the fact that the charged defendant had confessed to the crime, and that he had been previously tried and convicted of both rape and murder, and where on retrial the confession is suppressed but the public remains very much aware of the circumstances surrounding the case and has formed definite opinions as to the guilt or innocence of the defendant.

Id. The magistrate calculated that over 70 percent of the veniremen and several of the jurors had testified that they had a fixed opinion, and stated that "a certain pall is cast

¹⁸ Brief for Petitioner at 25-34. Petitioner also assigned error to the denial of the challenges for cause he made to Juror No. 3, Juror No. 12, and four potential jurors. App. at 16a; Brief for Petitioner at 34-39. The district court found no constitutional infirmity. 537 F. Supp. at 882-83. Petitioner does not raise those challenges on appeal.

Petitioner does argue on appeal that the trial court erred in denying his challenges for cause to Juror Hrin and both alternate jurors. Appellant's Brief at 25. Our disposition of this appeal makes it unnecessary to consider whether those arguments are properly before us.

upon those in the minority who testified that they had not formed a fixed opinion and could judge the case on its merits." *Id.* at 140a-41a. In his view, the empanelled jury was incapable of deciding the case solely on the evidence before it "but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." *Id.* at 141a. The magistrate concluded that petitioner could not have received a fair trial by an impartial jury in Clearfield County.

42. The district court rejected the recommendation of the magistrate. Although the court recognized the community's "substantial knowledge" of the case, it decided after an independent review of the record that the publicity had not been vicious or excessive. 537 F. Supp. at 877. It noted that the trial court had granted extensive latitude in the voir dire and stated that the exhaustion of the first panel of veniremen was not remarkable. *Id.* at 877, 882. The district court in its independent review also determined that all the jurors at some point said they could set aside their opinions. *Id.* at 877-82. Throughout it emphasized that the factual findings of the state court judge were presumptively correct under 28 U.S.C. §2254 (d) (1976). The district court concluded that petitioner had failed to carry his burden of establishing that actual prejudice had rendered a fair trial impossible.

C. Discussion

43. Petitioner argues on appeal that the exposure of the venire to prejudicial pretrial publicity, and the refusal to grant a change of venue, violated his sixth amendment rights.¹⁹ The sixth amendment guarantees to the accused

¹⁹ Petitioner in his brief separates his challenge based on pre-trial publicity from his challenge based on the refusal to change

the right to be tried "by an impartial jury." U.S. Const. amend. VI. Under the due process clause of the fourteenth amendment, the states are required to effectuate that right by giving "a fair trial to the accused by a panel of impartial, 'indifferent' jurors," *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); accord *Murphy v. Florida*, 421 U.S. 794, 799 (1975), "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); see *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966).

44. To satisfy that constitutional standard the jurors need not be totally ignorant of the facts of a case. *Murphy*, 421 U.S. at 799-800. A juror who has read about the case, even one who has conceived some notion as to the guilt or innocence of the accused, may nonetheless serve "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 799 (quoting *Irvin*, 366 U.S. at 723); see *Martin v. Warden*, 653 F.2d 799, 804, 806 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). At the same time, a juror's assurance that he can enter the jury box without an opinion is not dispositive if the accused can demonstrate "the ac-

venue. We consider the arguments to be inseparable. See *Martin v. Warden*, 653 F.2d 799, 802-06 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). The pretrial publicity and its effects were the basis for petitioner's motions for a change of venue. Our inquiry in this habeas corpus proceeding is restricted to whether the refusal to change venue amounted to a violation of petitioner's constitutional rights. *Id.* at 804; see *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963). There could be no constitutional violation unless petitioner was denied his constitutional right to an impartial jury because of pretrial publicity. *Beck v. Washington*, 369 U.S. 541, 556 (1962).

tual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Murphy*, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723); see *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir.), cert. denied, 449 U.S. 899 (1980).

45. The petitioner challenging his state court conviction in a habeas corpus proceeding must shoulder a particularly heavy burden. Unlike a defendant seeking review of his federal conviction, the petitioner cannot argue that simply because his jury has read of extra-record facts with a high potential for prejudice, a federal court must presume that the jury was prejudiced. Cf. *Marshall v. United States*, 360 U.S. 310, 313 (1959) (per curiam) (federal conviction reversed under supervisory power). A federal court reviewing a state conviction on habeas corpus may presume prejudice only in extraordinary cases where "the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings." *Murphy*, 421 U.S. at 798-99; see, e.g., *Sheppard*, 384 U.S. 333 (extremely inflammatory publicity and a courthouse given over to carnival); *Estes v. Texas*, 381 U.S. 532 (1965) (trial in circus atmosphere); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (twenty-minute confession repeatedly broadcast on television). The publicity in this case, though it had a high potential for prejudice, did not utterly corrupt the trial atmosphere in that fashion. See *Murphy*, 421 U.S. at 798; *Martin*, 653 F.2d at 805. Petitioner must therefore show "that the publicity has been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible." *Martin*, 653 F.2d at 805 (emphasis added); see *Murphy*, 421 U.S. at 797-799; *Estes*, 381 U.S. at 542-44; *Martin*, 653 F.2d at 804-06; *United*

States ex rel. Greene v. New Jersey, 519 F.2d 1356, 1357 (3d Cir. 1975) (per curiam).²⁰

46. To determine whether actual prejudice has been shown, we must examine the "totality of circumstances" for any indication that petitioner's trial was not fundamentally fair. *Dobbert v. Florida*, 432 U.S. 282, 303 (1977); see *Sheppard*, 384 U.S. at 352. In *Irvin v. Dowd*, 36 U.S. 712 (1961), the Supreme Court established the method by which such examinations are conducted. See, e.g., *Murphy*, 421 U.S. at 800-03; *Beck v. Washington*, 369 U.S. 541, 556-57 (1962); see also *Dobbert*, 432 U.S. at 302-03. First, the Court in *Irvin* considered the extent and content of the publicity because it was indicative of "the then current community pattern of thought." *Irvin*, 366 U.S. at 725-27. The Court then reviewed the voir dire. In the opinions expressed by potential jurors and the difficulty encountered in finding veniremen who could at least claim impartiality, the Court discovered evidence of a pattern of prejudice in the community. *Id.* at 727. Finally the Court looked to see whether that pattern of prejudice was reflected in the testimony of the jurors ultimately seated in

²⁰ In addition, because petitioner is challenging a state conviction on a petition for a writ of habeas corpus, the factual findings of the state courts are presumed to be correct unless petitioner can establish by convincing evidence that the factual findings were erroneous. 28 U.S.C. §2254(d) (1976); see *Sumner v. Mata*, 449 U.S. 539 (1981). At the same time, we have a duty as a federal appellate court "to make an independent evaluation of the circumstances." *Sheppard*, 384 U.S. at 362. In particular, because the nature and strength of a venireman's opinion is a mixed question of law and fact, *Irvin*, 366 U.S. at 723, we must "independently evaluate the voir dire testimony of the impaneled jurors" and the potential jurors. *Id.*; *Martin*, 653 F.2d at 807; see *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

the jury box. *Id.* at 727-28. Considering all these factors, the Court then concluded that the jurors' assurances of impartiality had to be discounted. *Id.* at 728.

1. The Publicity

47. The publicity preceding petitioner's trial was extensive and had great potential for prejudice. As in *Irvin*, petitioner's case was a "*cause celebre*" in a rural community which had been subjected to a barrage of publicity concerning a sensational murder. *Irvin*, 366 U.S. at 725; see *Murphy*, 421 U.S. at 798. That publicity, although accurate, factual in nature, and without editorial comment, see *Murphy*, 421 U.S. at 800 n.4, 802; *Beck*, 369 U.S. at 556, revealed prejudicial information "never heard from the witness stand" in the second trial. See *Sheppard*, 384 U.S. at 356.

48. First, the publicity disclosed that the jury in the first trial had convicted petitioner of the murder. Few revelations could be so damning to an accused. *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978). Possibly even more prejudicial was the disclosure of petitioner's written confessions and his testimony at the first trial. See *Rideau*, 373 U.S. 723; *United States v. Halderman*, 559 F.2d 31, 61 (D.C. Cir. 1976) (in banc) (per curiam), cert. denied, 431 U.S. 933 (1977); see also *United States ex rel. Doggett v. Yeager*, 472 F.2d 229, 231 (3d Cir. 1971). The confessions and testimony detailed in a highly unfavorable light petitioner's actions and thoughts at the time of the homicide. They were sworn revelations of information which petitioner's properly admitted oral statements simply did not convey. Cf. *Stroble v. California*, 343 U.S. 181, 195 (1952) (confession printed in newspaper was introduced into evidence); see also *United States v. D'Andrea*, 495 F.2d 1170, 1172-73 (3d Cir. (per

curiam), *cert. denied*, 419 U.S. 855 (1974). Finally, the publicity revealed that petitioner at the first trial had pled temporary insanity and had been convicted of rape. Such highly inflammatory facts carried too great a risk of prejudice to be directly offered as evidence. *See Marshall*, 360 U.S. at 312-13; *United States ex rel. Greene v. New Jersey*, 519 F.2d 1356 (3d Cir. 1975) (per curiam). "The exclusion of such evidence in court is meaningless when the news media makes it available to the public." *Sheppard*, 384 U.S. at 360; *see Murphy*, 421 U.S. at 802.

49. The publicity was understandably most extensive and most potentially prejudicial before and during petitioner's first trial, which was four years before his second trial. The passage of time may work to erase highly unfavorable publicity from the memory of a community. *See, e.g., Murphy*, 421 U.S. at 802; *Beck*, 369 U.S. at 556. In this case, however, voir dire revealed that more than 98 percent of the veniremen questioned remembered the case. In part this was due to the repeated community exposure provided by newspaper coverage of the appeal and retrial²¹

²¹ The state trial court, though the record contained at least 17 front-page articles, said that between trial and retrial "there was practically no publicity given to this matter through the news media . . . except to report that a new trial had been granted by the Supreme Court." App. at 751a. We believe, however, that petitioner has established by convincing evidence that the state court's characterization of the coverage was erroneous. 28 U.S.C. §2254(d) (1976). The record on this petition indicates that 66 front-page articles were published covering the appeal and second trial. *Cf. Sumner v. Mata*, 449 at 547 (federal and state court had identical record). We agree with the magistrate who after two days of evidentiary hearings found that the second trial "was surrounded with publicity, but not to the same degree" as the first trial. App. at 136a.

which helped keep fresh the imprint of the case in the minds of the public.²² More important, the publicity attending the homicide and first trial had been so extensive and intensive that the case was firmly implanted in the memories of Clearfield County residents.

50. Petitioner has established that the publicity before his second trial had revealed prejudicial information from his first trial, information which was not officially in evidence against him. The widespread dissemination of such extra-record information, while not rendering the jury presumptively prejudiced, poisoned the "general atmosphere of the community" in which petitioner was retried. See *Murphy*, 421 U.S. at 802. If petitioner can show that that atmosphere caused actual prejudice in the jurors, their assurances of impartiality can be disregarded. *Id.*

2. The Voir Dire

51. The difficulty of voir dire may provide crucial evidence that the sentiments of the community were so poisoned against an accused as to impeach the asserted indifference of his jurors. *Murphy*, 421 U.S. at 803. "The length to which the trial court must go in order to select

²² The trial court stated that "as far as this Court can recall" there was little talk in public concerning the second trial. App. at 196a. Veniremen during voir dire indicated, however, that there had been public discussion of the case, particularly in last weeks before retrial. Such discussion apparently did not reach the attention of the trial court.

The trial court also noted that few spectators had attended trial on some days, particularly during voir dire. Because petitioner alleges prejudice not from a "circus atmosphere" in the courtroom, see *Murphy*, 421 U.S. at 798; *Martin*, 653 F.2d at 805, but from public knowledge of extra-record facts occasional low attendance is a factor of limited significance.

jurors who appear to be impartial" reveals a great deal about those jurors' assurances of impartiality:

In a community where most veniremen will admit to a disqualifying prejudice, there liability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

Id. at 802-03.

52. In this case, as in *Irvin*, "impartial jurors were hard to find." *Irvin*, 366 U.S. at 727. In the long and difficult voir dire²³ 163 veniremen were questioned on the case. Our independent examination of the voir dire testimony shows that 126 prospective jurors, or 77 percent of the 163 veniremen questioned, admitted that they would carry an opinion into the jury box. The trial court itself excused on challenges for cause 117 of those veniremen, or 72 percent of the 163, after they stated that they could not set aside their opinion.²⁴ Only when petitioner had ex-

²³ The trial court explained that the voir dire was lengthy because petitioner was permitted to ask so many questions. App. at 194a-95a, 751a. The court did indeed extend great leniency to petitioner in his questioning of the veniremen. Such leniency was commendable. It was also necessary under the circumstances, and does not explain away the difficulty of the voir dire as a real factor in our consideration.

²⁴ The trial court stated that the difficulty in selecting a jury was due in part to his leniency in granting challenges for cause. App. at 195a, 751a. In our independent evaluation, each of the 117 veniremen dismissed for cause by the trial court had expressed a disqualifying prejudice which required dismissal. In fact, as we have noted, the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors.

hausted his peremptory challenges could enough jurors be found to fill the jury box. *Cf. Dobbert*, 432 U.S. at 302 (peremptory challenges not exhausted); *United States v. Gorel*, 622, F.2d 100, 103-04 (5th Cir.) (same), *cert. denied*, 445 U.S. 943 (1980).

53. In *Irvin* the trial court dismissed for cause 268 of 430 veniremen, or 62 percent, because they had fixed opinions concerning the petitioner's guilt. Almost 90 percent of those examined entertained some opinion as to guilt. 366 U.S. at 727. In those circumstances the Supreme Court "readily found actual prejudice against the petitioner to a degree that rendered a fair trial impossible." *Murphy*, 421 U.S. at 798; *accord United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 368-69 (2d Cir. 1962) (in banc) (31 of 38 veniremen questioned had formed opinions), *cert. denied*, 372 U.S. 978 (1963). By contrast, in *Murphy* the Court found no basis to cast doubt on the juror's assurances of impartiality where only 20 of 78 veniremen questioned, or 26 percent, were excused because they disclosed an opinion as to guilt. *Id.* at 803; *accord Beck*, 369 U.S. at 556 (14 of 56 veniremen might have had opinions); *Martin*, 653 F.2d at 806 (23 of 81 veniremen questioned had opinions); *Brinlee v. Crisp*, 608 F.2d 839, 845 (10th Cir. 1979) (19 of 47 veniremen questioned had opinions), *cert. denied*, 444 U.S. 1047 (1980); *Haldeman*, 559 F.2d at 70 & n.56 (29-36 percent of veniremen arguably had opinions), *cert. denied*, 431 U.S. 933 (1977); *Mastrian v. McManus*, 554 F.2d 813, 818 (8th Cir.) (41 of 92 veniremen questioned had opinions), *cert. denied*, 433 U.S. 913 (1977).

54. In the instant case voir dire revealed other indications of a deep and bitter prejudice present in the community. One venireman apparently veiled his strong feel-

ings when testifying. Another said that her fellow parishioners tried to influence her to vote guilty. Many veniremen volunteered opinions of guilt, and over 90 percent of those asked said they had discussed the case or heard others express their opinions.

55. We believe that the voir dire in this case more strongly resembles that of *Irvin* than that of *Murphy*. See *Martin*, 653 F.2d at 806. Three-quarters of the veniremen admitted to an opinion of guilt which they could not set aside. "Where so many, so many times, admitted prejudice, [a juror's] statement of impartiality can be given little weight." *Irvin*, 366 U.S. at 728; *Martin*, 653 F.2d 806.

3. The Jurors Selected

56. The prejudice permeating the voir dire and the community was reflected in the voir dire testimony of the majority of the twelve jurors and two alternates ultimately placed in the jury box.²⁵ All but one of the jurors were

²⁵ The alternate jurors were dismissed and did not participate in the jury's deliberations. An alternate who did not deliberate does not contaminate a jury unless there is reason to believe that the jury had been exposed to the alternate's prejudicial information or opinion. See *United States v. Vento*, 533 F.2d 838, 860-70 (3d Cir. 1976). In this case the jurors were told they could discuss the case among themselves when sequestered. For four days the two alternate jurors were seated and sequestered with the regular jurors. Even though there is no evidence that the prejudiced alternates talked to the regular jurors, such a sustained condition of "continuous and intimate association" operates to subvert the requirement that the jury's verdict be based on evidence developed from the witness stand. See *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (jurors guarded by deputy sheriffs who were witnesses); see also *United States ex rel. Owen v. McMann*, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971).

familiar with the case, and several explicitly recalled petitioner's conviction or confessions. Eight out of fourteen jurors would admit that, before hearing any testimony, they had formed an opinion as to petitioner's guilt or innocence. *Cf. Irvin*, 366 U.S. at 727 (8 of 12 had formed opinions); *Denno*, 313 F.2d at 367-68 (8 of 16 had formed opinions).²⁶

With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.

Irvin, 366 U.S. at 727 (citation omitted). Indeed, when asked whether they could set their opinions aside and forget what they had heard, many of the jurors gave uncertain and ambiguous answers. Even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went "so far as to say that it would take evidence to overcome their belief." *Id.* at 728; *Murphy*, 421 U.S. at 798.²⁷

²⁶ As a result of our independent evaluation, we must therefore reject the trial court's conclusion that "almost all, if not all, [of the first twelve] jurors . . . had no prior or present fixed opinions." App. at 196a.

²⁷ Petitioner did not challenge nine jurors. Because Pennsylvania at the time of retrial required that objection be made before the jury retired to deliberate, Pa. R. Crim. P. 1006(d) (1975), petitioner's failure to challenge a juror for cause waived objection to that particular juror, *Provenzano*, 620 F.2d at 996 n. 15, unless petitioner can show cause for failing to object and prejudice therefrom. *Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir. 1982); *Graham v. Mabry*, 645 F.2d 603, 606 (8th Cir. 1981); see *Engle*

57. It is hardly surprising that the assurances of impartiality given by petitioner's jurors were equivocal or negative. It is more surprising that some could indeed give blanket assurances of impartiality. Petitioner's jurors were members of a community barraged by publicity and alive with discussion, a community where three quarters of those called would admit to a disqualifying prejudice. Those jurors were then asked to forget that petitioner had been convicted of the murder, and rape, of Pamela Rimer. They were asked to forget how petitioner twice in writing and once on the stand had retold in detail that he had killed her, and how he had offered no defense except for temporary insanity. Those jurors were asked to forget all they knew and put their impressions and opinions aside. Such a request took insufficient account of "the frailties of human nature." *Irvin*, 366 U.S. at 728.

58. "Impartiality is not a technical conception. It is a state of mind." *Id.* at 724 (quoting *United States v. Wood*, 299 U.S. 123, 145 (1936)). We must view the jurors' assurances of impartiality in light of the pretrial publicity, the difficulty of voir dire, and the testimony of the jurors selected. We conclude that despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a

v. Isaac, 456 U.S. 107, 130 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Where as here a fair trial was impossible not because of a particular juror but regardless of the particular jurors, challenge of any individual juror for cause is not required. Failure to challenge any of the jurors selected, however, is "strong evidence" that the accused thought the jurors were not biased. *Beck*, 369 U.S. at 557-58.

fair trial impossible in Clearfield County. After examining the totality of circumstances, we hold that petitioner's retrial was not fundamentally fair.

III. CONCLUSION

59. We will affirm that part of the district court's order holding that petitioner's constitutional right against self-incrimination was not violated by the admission into evidence of his oral statements. We will vacate that part of its order holding that retrial in Clearfield County did not infringe petitioner's right to a fair trial by an impartial jury.

60. Petitioner's detention and sentence of life imprisonment are in violation of the Constitution of the United States. He is therefore entitled to be freed from that detention and sentence. Petitioner is still subject to custody under the indictment, however, and he may be retried on this or another indictment. *Irvin*, 366 U.S. at 728.

61. We will remand the case to the district court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth shall afford petitioner a new trial.

STERN, District Judge, concurring.

Under any test reflecting even the most minimal respect for the values embodied in the sixth amendment, we would be compelled to invalidate this conviction. My concern, however, is with the particular constitutional standard which for 175 years has guided the lower courts, which we are obligated to apply today, and which renders constitutional trials taking place under circumstances only slightly less shocking than those presented in this case.

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme Court, crystalizing earlier language from *United States v. Burr*, 25 F. Cas. 49, 50-51 (C.C.D. Va. 1807) (No. 14,692g) (Marshall, C.J.); *Reynolds v. United States*, 98 U.S. 145, 155-156 (1878); *Spies v. Illinois*, 123 U.S. 131, 179-80 (1887), and *Holt v. United States*, 218 U.S. 245, 248 (1910), established that it is permissible to empanel a jury composed of 12 persons, all of whom have a preconceived opinion that the defendant is guilty, as long as each promises to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723. Accord *Murphy v. Florida*, 421 U.S. 794 (1975); *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981), cert. denied, 454 U.S. 1151 (1982).

According to the *Irvin* Court: "[T]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Irvin*, 366 U.S. at 723. I cannot see why it is "impossible" to obtain jurors who do not begin with a bias. The test I suggest would not disqualify a juror merely because he has been exposed to pretrial publicity; rather, only those who

represent that they have formed an opinion—irrespective of the degree of its fixation—must be excluded automatically from jury participation.

There can be but two possible explanations for the *Irvin* standard. The first is that it presumes to be meaningful: that a promise to lay aside an opinion, for example, that an accused high school teacher brutally killed one of his own students is either believable or enforceable. Definitive refutation of this precept as a psychological matter is, of course, beyond my capabilities, but I would venture that no one of us would want to gamble our freedom on the ability of a person to erase a preformed opinion as to guilt.¹ Moreover, even if such self-imposed amnesia is possible as a cognitive event, surely its prediction is not reliable—that is, we cannot expect a person to know with any degree of accuracy at the time of voir dire whether or not he will be able to lay aside an opinion, however desirous he is of achieving that end. I see no reason to subject our jury system to the hazards of guesswork, particularly where the alternative is so easily achieved. Thus, I reject the *Irvin* standard as a means to insure impartial jurors.²

¹ Commentators with psychological training have come to the same conclusion. See, e.g., Comment, *Fair Trial v. Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Ability to be Impartial; A Plea for Reform*, 38 S. Cal. L. Rev. 672, 682 & nn.53, 54 (1965); see also Stanga, Jr., *Judicial Protection of the Criminal Defendant Against Adverse Press Coverage*, 13 Wm. & Mary L. Rev. 1, 5 & n.23 (1971).

² The voir dire at the celebrated trial of "Boss" Tweed over 100 years ago provides a wonderful example of the strain imposed upon any notion of "impartiality" by the "laying aside" standard. Various veniremen, all of whom indicated a preformed opinion of some degree, revealed a variety of strategies by which they felt they could rid themselves of their initial partiality. In

The second conceivable rationale for the *Irvin* test is that it is a practical necessity, without which the empanelling of juries would be impossible. I simply refuse to be-

listening to their voices, we must decide if it makes sense to continue the same dialogues today.

One venireman suggests that he is able to lay aside his opinion as a matter of duty:

Q. If you were to go into that jury box, would you require any evidence whatever to remove the impression that you now have?

A. Not as a juryman; no, sir.

Q. Your belief as a juryman is a different thing from your belief as a man?

A. If any one should come up in the street and tell me Mr. Tweed was an innocent man, I should not at once believe it unless he gave me some proof to the contrary; but in the jury-box I go in there free from any prejudice as a juryman I think that is the duty of the juryman, that it ought not to require any evidence at all to remove any impression. That is what I intended to convey in my answer to the judge.

Record of *People v. Tweed*, 50 How. Pr. 262 (N.Y. Sup. Ct. 1876) at 104. Another admits that the process is unpredictable:

Q. If you were to go into the trial as a juror would you not carry that same [preformed] impression into the jury-box?

A. I think if I was called upon to serve as a juror I could free my mind from all prejudice or impressions and act impartially; that is my belief.

Q. Have you ever tested that belief in a like case?

A. Never, sir.

Q. It would be an experiment on your part?

A. Certainly it would

Id. at 142-43. Another views the process as one of degrees of belief:

The Court—I would like to have you give in your own way and in your own language the condition of your mind in regard to Mr. Tweed or his dealings with the city.

lieve that in a land as populous as ours, where potential jurors abound, the only way to assemble a group of 12 im-

The Witness—My view is this: I read the newspaper like everybody else; I have heard the proceedings, and of the charges against Mr. Tweed like everybody else, I have certain superficial information; on that superficial information I have formed an opinion; that is all I have had to do, and all I have seen the necessity of doing; I have never looked into the case with any degree of particularity; I have never examined the evidence as a lawyer would have examined it. I have formed an opinion; I do not consider that I have formed what I call a decided opinion, because I have not looked into it so thoroughly as to entitle me to have that opinion, but I have given it this general superficial examination. I am now here and am called upon this struck jury, and if I am to serve as jurymen, I believe that I can act conscientiously and fairly for Tweed and fairly for the County. I have been asked the question whether I would prefer that Tweed should succeed or the County, and I have answered that I should prefer that the County should succeed. I do not mean that I would have any bias which would make me decide against Tweed, for the County or against the County for Tweed; I would be prepared to decide according to the evidence.

Id. at 94-95. Another describes the process as a function of will:

Q. But could you, no matter what form of oath were put to you, enter upon the trial without having the impression upon your mind that Mr. Tweed has been guilty of those frauds?

A. I should try.

Q. Could you succeed?

A. I think so.

Q. You think that you could forget what you now believe?

A. I think I could dismiss it from my mind; forget it, no.

Id. at 204.

All of these veniremen were seated as competent jurors.

partial persons is to allow those with advance opinions to sit as long as they give a proper incantation of their ability to lay aside those opinions. If a jury cannot be selected without resort to persons with preformed views of a defendant's guilt, it should be a simple matter to transfer the case to another county. There is simply no societal interest advanced by seating a juror who has openly stated that he has a view concerning the defendant's guilt, notwithstanding that it can be "laid aside."

The vulnerability of the *Irvin* "laying aside" standard is only heightened where attempts to temper its potentially devastating consequences for a criminal defendant are examined. The *Murphy* Court pointed out that,

[T]he juror's assurances that he is equal to this task [laying aside prior opinion] cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality."

Murphy, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723). I am at a loss to understand how a defendant would ever be able to demonstrate that despite a venireman's assurance that he is able to lay aside a preconception of defendant's guilt, there actually exists in the potential juror's mind a "fixed" opinion which cannot be extinguished.

My view of the proper standard by which to measure the propriety of seating a particular juror does away with the distinction between opinions that are "fixed" and those that are something less so, as a spectral analysis empty of meaning. A person with any opinion going to the issue of a defendant's guilt is simply unfit to serve on a jury. It is incredible to me that anyone would want to take the con-

trary view. Further, in a highly publicized case, I would discredit the denial of preconceived opinions where a significant percentage of those polled state that they hold opinions concerning the defendant. While the Court has recognized that veniremen prejudice may be presumed in the face of protestations to the contrary where most of the other prospective jurors admit to a disqualifying bias, *compare Irvin*, 366 U.S. at 727 (nearly 90 percent of veniremen have some opinion regarding defendant's guilt; prejudice in remainder presumed), *with Murphy*, 421 U.S. at 802 (roughly 26 percent of veniremen have an opinion; no presumption regarding remainder), I would not allow any jury to be empanelled where more than 25 percent of the veniremen state that they hold an opinion concerning the defendant's guilt. Where over one quarter of those polled indicate such bias, I have grave doubts as to the sincerity of representations of impartiality by others in the community.

It has long been the foundation of our legal system that, "[N]o man's life, liberty or property be forfeited as criminal punishment for violation of that law until there ha[s] been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940). I do not see how we can live by this ideal while continuing to apply the *Irvin* test. I would adopt a different standard, originating at the confluence of sense and simplicity, which would prevent any person from entering the jury box and becoming a judge of the facts if he has any preconceived view of the merits of the case.

GARTH, *Circuit Judge*, concurring in the judgment.

In this case Juror James F. Hrin, who sat in judgment of the petitioner, Jon Yount, admitted during his *voir dire* that until he was shown facts establishing Yount's innocence, he would find it difficult to change his opinion about Yount's guilt. Because I conclude that Hrin, by so testifying during the *voir dire*, demonstrated "the actual existence of such an opinion in the mind of [one of Yount's] juror[s] as will raise the presumption of partiality," *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961), I concur in the judgment of the court that a new trial is required.

My concurrence, however, is limited to the issue raised by Yount's charge that Juror Hrin had been improperly impaneled. Thus, while I agree with Judge Hunter that Yount's fifth amendment rights were not violated when his inculpatory statements were admitted at his second trial, I do not agree with Judge Hunter that pre-trial publicity required a change of venue. As I read the record, it was the failure of the trial judge to apply the principles of *Irvin, supra*, in excusing jurors for cause that resulted in an unfair trial. Thus, I restrict my vote for a remand and new trial solely to the issue of Juror Hrin's impaneling as a juror, and do not agree with Judge Hunter's thesis that the district court erred in denying a change of venue.

I.

As the majority notes, Yount had been convicted of murder and rape in 1966. After the Pennsylvania Supreme Court set aside both of these convictions in 1969, Yount

was tried a second time for murder in November of 1970. The voir dire in this second trial exhausted ten days and 167 veniremen,¹ 121 of whom were dismissed for cause.

Among the twelve jurors and two alternates selected to try Yount, six testified that they had formed no opinions as to Yount's guilt. Five jurors stated that they had formed opinions about the case, but that they could lay those opinions aside and keep an open mind. Finally, three jurors—both of the alternates and Juror James F. Hrin—testified that they had opinions of Yount's culpability but could change these opinions if the proper evidence were presented.²

Juror Hrin's voir dire examination by the prosecution disclosed that Hrin was uncertain whether he could render a verdict based solely on the evidence adduced at trial. Responding to two questions by the prosecutor, Hrin asserted that he "wouldn't say for sure" whether he could "erase or remove the opinion" he held, but stated a second time that he could do so. Hrin's answers were punctuated with suggestions that he thought he "possibly could" render a fair verdict, and that "[i]t would be rather diffi-

¹ Two hundred ninety-two persons were selected as talesmen for Yount's second trial, 125 of whom the court dismissed as improperly chosen after learning that the Clearfield County sheriff had selected friends and acquaintances of his own in order to obtain a full complement of jurors. The court dismissed an additional four jurors for cause before questioning. Although the Magistrate's report lists 168 jurors who were questioned, I agree with Judge Hunter that the record reveals only 167.

² Neither alternate juror participated in the jury's deliberations. Their impartiality is not challenged before us.

cult for me to answer" whether he "could enter the jury box presuming [Yount] to be innocent."³

Under cross-examination by counsel for the defendant Yount, Hrin asserted that he would require the production

³ Hrin's voir dire examination by the prosecutor was as follows:

Q. Have you formed any opinion as to the guilt or innocence of Mr. Yount?

A. To the degree that it was written up in the papers, yes.

Q. Is this a fixed opinion on your part?

A. This is sort of difficult to answer.

Q. Let me ask—if you were to be selected as a juror in this case and take the jury box, could you erase or remove the opinion you now hold and render a verdict based solely on the evidence and law produced at this trial.

A. It is very possible. I wouldn't say for sure.

Q. Do you think you could?

A. I think I possibly could.

Q. Then the opinion you hold is not necessarily a fixed and immobile opinion?

A. I would say not, because I work at a job where I have to change my mind constantly.

Q. Would you be able to change your mind regarding your opinion before become a juror in this case? That's the way I must have you answer the question.

A. If the facts were so presented I definitely could change my mind.

Q. Would you say you could enter the jury box presuming him to be innocent?

A. It would be rather difficult for me to answer.

Q. Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the Judge?

A. That I could do.

of evidence before he would abandon any opinion of Yount's guilt. Hrin stated as follows:

Q. Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?

A. Definitely. If the facts show a difference from what I had originally had been led to believe, I would definitely change my mind.

Q. But until you're shown those facts, you would not change your mind—is that your position?

A. Well—I have nothing else to go on.

Q. I understand. Then the answer is yes—you would not change your mind until you were presented facts?

A. Right, but I would enter it with an open mind.

Q. In other words, you're saying that while facts were presented you would keep an open mind and after that you would feel free to change your mind?

A. Definitely.

Q. But you would not change your mind until the facts were presented?

A. Right. . . .

Yount promptly challenged Juror Hrin for cause, a challenge the trial court denied because "he declared he could go in there with an open mind." The trial court reasoned as follows:

I deny the challenge for cause because he declared he could go in there with an open mind; and Commonwealth against Bentley [287 Pa. 539, 135 A. 310

(1926)] sets forth that—any juror is incompetent who has a fixed and definite opinion which cannot be erased by hearing and evidence—and he said he could disregard it and be guided by the law and evidence, and I believe he stated he could go in with an open mind. I would accept that as being sufficient to overcome the conviction that you proposed that he has a fixed opinion that he could not put aside and I think his answers were unequivocal [sic] enough as to any fixation as to opinion as he declared although he had a solid opinion it is not quite as solid as it used to be which indicates that it is not solid. His expression is such that there is not now a fixed opinion and therefore I so accept it.

On appeal, the Pennsylvania Supreme Court concluded summarily that “[t]he record shows that none of the jurors had a fixed opinion as to appellant’s guilt or innocence, or was otherwise legally unable to serve.” *Commonwealth v. Yount*, 455 Pa. 303, 314, 314 A.2d 242, 248 (1974).

On January 8, 1981, Yount filed *pro se* a petition for habeas corpus. Paragraph 12-B of the petition asserted in part that “two [jurors] stated that they would require Petitioner to prove his innocence.” In light of the record in this case, it is patent that one of the jurors referred to in paragraph 12-B is Juror Hrin.⁴ The district court reviewed

⁴ There is therefore no question that the issue of Hrin’s partiality is before us on appeal. See *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3d Cir. 1978) (“[w]e can consider any issue, previously considered by the Pennsylvania courts, which was presented to the district court and would be ground for a reversal”). I assume that the other juror referred to in paragraph 12-B was an alternate juror. No alternates were substituted for members of the jury which convicted Yount. See note 2 *supra*.

pertinent portions of each of the jurors' voir dire testimony, including Hrin's, but did not concentrate on Hrin's testimony in particular, and made no findings respecting it. See *Yount v. Patton*, 537 F. Supp. 873, 880 (W.D. Pa. 1982). Yount argues before us on appeal that Hrin had abandoned the presumption of innocence, and that Yount could not constitutionally be convicted by a panel containing such a juror.

II.

As the Supreme Court in *Nebraska Press Association v. Stuart* stated, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." 427 U.S. 539, 554 (1976). In order to explain fully why I do not believe the district court erred in denying a change in venue due to alleged prejudicial publicity, it is useful to review those circumstances in which jury exposure to adverse publicity does require a new trial.

First, the accused may demonstrate the actual existence of prejudice attributable to pretrial publicity on the part of one or more members of the jury. See *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Such prejudice must be shown "not as a matter of speculation but as a demonstrable reality," *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956), and is usually established by reliance on the jurors' voir dire responses. See *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir.), cert. denied, 103 S.Ct. 102 (1982).

Second, in extreme cases of highly inflammatory pretrial publicity which saturates the community from which the jury is drawn, the accused may rely on a presumption of partiality, and need not prove actual bias. See *Rideau*

v. Louisiana, 373 U.S. 723, 726-27 (1963); *cf. Murphy v. Florida*, 421 U.S. 794, 802-03 (1975); *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981). This presumption is rebuttable, however, and the prosecution may demonstrate the impartiality of the jury by reliance on the *voir dire* testimony. See *United States v. Chagra*, *supra*, 669 F.2d at 250, 252-54; *United States v. Johnson*, 584 F.2d 148, 154 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); *United States v. Gullian*, 575 F.2d 26, 29-30 (1st Cir. 1978).

Third, the accused can demonstrate "a significant possibility of prejudice," *United States v. Davis*, 583 F.2d 190, 196 (5th Cir. 1978), and that the *voir dire* procedure was inadequate to permit its discovery. See *United States v. Blanton*, 700 F.2d 298, 307-08 (6th Cir. 1983); *United States v. Dellinger*, 472 F.2d 340, 374-75 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968); *cf. United States v. Capo*, 595 F.2d 1086, 1092 n.6 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *United States v. Haldean*, 559 F.2d 31, 64-71 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *United States v. Addonizio*, 451 F.2d 49, 65-67 (3d Cir. 1971), *cert. denied*, 405 U.S. 1048 (1972).

In addition, in two classes of cases the accused may assert that events transpiring during the course of trial rendered the trial unfair. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), and *Estes v. Texas*, 381 U.S. 532 (1965), the Supreme Court condemned the conduct of trials "utterly corrupted by press coverage." See *Dobbert v. Florida*, 432 U.S. 282, 303 (1975). In these cases, the presence of the press during trial rendered the conduct of

a fair trial impossible.³ A similar intrusion into the trial process occurs when members of the jury are exposed to publicity during the trial. See *Marshall v. United States*, 360 U.S. 310, 311 (1959); *Goins v. McKeen*, 605 F.2d 947, 952-54 (6th Cir. 1979); *United States v. Williams*, 568 F.2d 464, 468 (5th Cir. 1978); *United States v. Jones*, 542 F.2d 186, 194-97 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

In this case, no juror was exposed to adverse publicity during trial, and the record reflecting the publicity preceding Yount's second trial, in my opinion, was not so inflammatory as to give rise to a presumption of partiality. In addition, it is conceded that the trial court "extend[ed] great leniency to [Yount] in his questioning of the veniremen," Maj. op., typescript at 33 n.23, and no argument is raised that the *voir dire* was less than ample to expose the prejudices of potential jurors. Therefore, the only basis for upsetting Yount's conviction is the existence of the "actual prejudice" of one or more members of the jury.

An accused may demonstrate "actual prejudice" on the part of the jury in two ways. First, the defendant may

³ Although *Rideau v. Louisiana*, *Sheppard v. Maxwell*, and *Estes v. Texas* are frequently discussed as a unit, see, e.g., *United States v. Dozier*, 672 F.2d 531, 545-46 (5th Cir.), cert. denied, 103 S. Ct. 256 (1982), *Sheppard* and *Estes* should be recognized as analytically distinct from *Rideau*. *Rideau* represents the only instance in which the Supreme Court has reversed a conviction solely on the basis of the extent and nature of pretrial publicity without a showing of actual prejudice. See *Mayola v. Alabama*, supra, 623 F.2d at 997. *Sheppard* and *Estes*, in contrast, represented intrusions into the trial process which undermined the integrity of the trial. See *United States v. Chagra*, supra, 669 F.2d at 249 n.10; *United States v. Haldeman*, supra, 559 F.2d at 61 n.32.

establish, by means of the *voir dire* testimony, that one or more jurors had a preconceived opinion of the defendant's guilt which could not be set aside in order to "render a verdict based on the evidence presented in court." *Irvin v. Dowd*, *supra*, 366 U.S. at 723. In such a case, the trial court would err by not granting a challenge to this juror for cause. A change of venue, however, would not be required if the challenge for cause were granted.

Second, in extremely rare circumstances the accused may establish "actual prejudice" by inference. See *Murphy v. Florida*, 421 U.S. 794, 803 (1975). In such a case the defendant must demonstrate "a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." *Id.* In the only Supreme Court case to rely on this ground, *Irvin v. Dowd*, ninety percent of those examined on the point had a preconceived notion of the defendant's guilt, and eight persons who actually sat in judgment of the defendant thought the defendant guilty, 366 U.S. at 727. Indeed, just recently this court refused to apply the *Irvin* principle to reverse a conviction in which only 23 of 71 persons known to be exposed to pretrial publicity had fixed opinions of the defendant's guilt. *Martin v. Warden*, 653 F.2d 799, 806 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). Thus while I agree that if the defendant establishes the existence of a community "so poisoned against the [defendant] as to impeach the indifference of jurors who displayed no animus," then a change of venue is required, I do not agree that merely because a number of prospective jurors harbor opinions of guilt, that the *voir dire*, fairly conducted, cannot screen the biased from the fair-minded.

A showing of actual prejudice by this method is not to be lightly accomplished. As the Fifth Circuit stated in *United States v. Dozier*, 672 F.2d 531, 546 (5th Cir.), cert. denied, 103 S.Ct. 256 (1982), "detection of actual prejudice is not accomplished through juggling statistics." *Irvin* does not establish a bright-line rule that a venire containing a percentage of biased talesmen above a certain level to presumptively bad. Rather, the court must examine the totality of the circumstances, including the adequacy of the *voir dire* in ferreting out biased jurors, in order to establish whether a change of venue is constitutionally required.

A thorough and skillfully conducted *voir dire* should be adequate to identify juror bias, even in a community saturated with publicity adverse to the defendant. As the District of Columbia Court of Appeals noted, "*voir dire* has long been recognized as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner." *In re Application of National Broadcasting Co.*, 653 F.2d 609, 617 (D.C. Cir. 1981) (footnotes omitted). For this reason the courts of appeals have repeatedly expressed "confidence in the effectiveness of a skillful *voir dire* to counteract the threat of pretrial publicity." *United States v. Duncan*, 598 F.2d 839, 865-66 (4th Cir.), cert. denied, 444 U.S. 871 (1979). Reviewing the conviction of Lieutenant William Calley for the killing of civilians at My Lai, a trial that generated considerably more pretrial publicity than Yount's second trial in 1970, the Fifth Circuit observed that "[t]here has been a greater willingness to uphold a trial court's determination that jurors were capable of rendering an impartial verdict where that conclusion was reached after deliberate, searching, and thorough *voir dire*." *Calley v. Callaway*, 519 F.2d

184, 209 n.45 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). See also *Graham v. Mabry*, 645 F.2d 603, 611 (8th Cir. 1981); *United States v. Capo*, 595 F.2d 1086, 1091-92 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *Margoles v. United States*, 407 F.2d 727, 729-31 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969).

As *Irvin* makes plain, a juror's subjective affirmation of impartiality is not dispositive of the question of juror bias. It has always been clear that "merely going through the form of obtaining jurors' assurances of impartiality is insufficient." *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963). Instead, the trial court must determine independently and objectively whether the jurors' assurances are credible. See *United States v. Blanton*, 700 F.2d 298, 307-08 (6th Cir. 1983); *United States v. Gerald*, 624 F.2d 1291, 1296-97 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981). The American Bar Association's Standards for Criminal Justice provide that the *voir dire* "shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial." *ABA Standards for Criminal Justice* §8-3.5 (2d ed. 1978). The objective evaluation of this information, however, rests with the trial court. In *Irvin*, the trial court (which itself questioned the jurors challenged for cause) did not engage in a searching and thorough *voir dire*. Instead, the court erroneously credited the jurors' subjective opinions that each could render an impartial verdict notwithstanding his or her opinion. *Irvin v. Dowd*, *supra*, 366 U.S. at 724.

Yount's case, however, differs significantly from *Irvin v. Dowd*. First, counsel themselves conducted the

voir dire in Yount's trial and, as Judge Hunter concedes, were afforded great leniency in the questioning of veniremen. Second, Yount challenged only three jurors for cause, and two of those jurors, according to the district court's findings, "indicated that they harbored no fixed opinion." *Yount v. Patton*, *supra*, 537 F. Supp. at 878. Third, the trial court permitted questioning on the exposure of each juror to publicity and the degree of fixation of each juror's opinion. Six of the jurors testified that they had no preconceived opinion of Yount's guilt at all. Among the remaining six jurors, Yount challenged only one—Juror James F. Hrin, whom I discuss below—for cause. The scope and depth of the *voir dire*, and the absence of challenges for cause to each juror except Hrin, was adequate to support an independent and objective determination that, with the exception of Hrin, the jurors could "lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, *supra*, 366 U.S. at 723.

Judge Hunter, however, discounts the extensive *voir dire* conducted in Yount's 1970 trial and the absence of challenges for cause to each juror except Hrin. Rather, Judge Hunter's opinion places great weight on the finding that "77 percent of the 163 veniremen questioned admitted that they would carry an opinion into the jury box." Maj. op., typescript at 33. To my mind, this reliance on statistics, without regard to the scope of the *voir dire* or the absence of challenges for cause, elevates to talismanic significance the percentage of veniremen *as a whole* with opinions about a defendant's guilt. I do not believe *Irvin v. Dowd* was ever intended to be read in this fashion. If the scope of the *voir dire* is ample—as it concededly is in this case—the fact that a large percentage of persons who

are *not* on the jury have prejudices should carry little weight.

There are undoubtedly many communities in which large percentages of the veniremen have been exposed to pretrial publicity and have a notion of the defendant's guilt. The well-publicized trials of the Watergate defendants, see *United States v. Haldeman, supra*, and of Lieutenant William Calley, see *Calley v. Callaway, supra*, are undoubtedly of this character. But, the very function of the *voir dire* is to root out such persons with preconceived prejudices and identify only those who can, by the trial court's independent determination, lay aside any prejudices and render a verdict based solely on the evidence adduced during trial. Thus, given a *voir dire* which is concededly adequate and which functions to achieve its designed purpose, a venue change is not constitutionally required simply because many of the persons who will *not* serve on the defendant's jury may harbor prejudices as to the defendant's guilt.

For these reasons, I do not join Judge Hunter's holding that a change of venue in Yount's case was constitutionally required. Nevertheless, I concur in the judgment of the court because I conclude, for the reasons that follow, that Juror James F. Hrin should not have been impaneled in this case.

III.

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme Court held that the mere existence of any preconceived notion as to the guilt or innocence of an accused is not, without more, sufficient to rebut the presumption of a prospective juror's impartiality. *Id.* at 723. As the Court observed, however, the adoption of such a rule does not

“ ‘foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner’s life or liberty without due process of law.’ ” *Id.*, quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941) .

The test of a prospective juror’s impartiality, articulated in *Reynolds v. United States*, 98 U.S. 145 (1878) , and reiterated in *Dowd, supra*, is whether

“the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. . . . The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside.” [*Reynolds v. United States*, 98 U.S. 145, 156-57 (1878) .]

Irvin v. Dowd, supra, 366 U.S. at 723. See *Murphy v. Florida*, 421 U.S. 794, 800 (1975) .

Hrin’s voir dire testimony, taken as a whole, demonstrates the “actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.” Even the testimony adduced by the prosecution raised serious doubts whether Hrin entered the jury box with an open mind. The record reveals that Hrin asserted simultaneously that he could keep an open mind and that he could not “say for sure” whether he could do so. In response to the question whether Hrin “could enter the jury box presuming [Yount] to be innocent,” Hrin conceded that “[i]t would be rather difficult for me to answer.”

Testimony adduced by the defense further revealed that Hrin would require Yount to produce evidence before Hrin would abandon his preconceived opinion of Yount’s guilt. Hrin affirmed that he “would not change [his]

mind until [he] was presented [with] facts." Having so stated, Hrin abandoned the presumption of innocence. While the law permits a juror to affirm that he or she will enter the jury box with an open mind, a juror cannot require that the defendant produce evidence to wipe clean a prior perception or opinion. The jurors must be impartial when sworn. They cannot agree to be impartial only if the defendant convinces them to be so.

In this case, a juror, by his own admission, required the production of evidence to change his preconceived opinion of the defendant's guilt, and agreed to keep an open mind about this evidence if and when he heard it. As a matter of law, this admission raises a presumption of partiality. A defendant cannot constitutionally be convicted by a jury containing one such juror. *Irvin v. Dowd, supra*, 366 U.S. at 723; *id.* at 728 ("some [jurors went] so far as to say that it would take evidence to overcome their belief").

IV.

In concluding as a matter of law that Juror Hrin's testimony raises a presumption of impartiality under *Irvin v. Dowd, supra*, I am fully cognizant that in a federal habeas corpus proceeding, the findings of a state court "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear. . . ." 28 U.S.C. §2254(d) (1976); see *Sumner v. Mata*, 449 U.S. 539, 551 (1981). Under *Irvin v. Dowd*, however, an opinion of a prospective juror raises a presumption of partiality by operation of law, and therefore poses a mixed question of law and fact. As the Court in *Dowd* stated,

the test is 'whether the nature and strength of the opinion formed are such as in law necessarily . . .

raise the presumption of partiality. The question thus presented is one of mixed law and fact. . . . As was stated in *Brown v. Allen*, 344 U.S. 443, 507, the "so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors.

Irvin v. Dowd, *supra*, 366 U.S. at 723.

In this case the Pennsylvania Supreme Court concluded that "none of the jurors had a fixed opinion as to [Yount's] guilt or innocence." *Commonwealth v. Yount*, *supra*, 455 Pa. at 314, 314 A.2d at 248. Nevertheless, the trial court found that Hrin had a "solid opinion [although] not quite as solid as it used to be." Neither the trial court nor the Pennsylvania Supreme Court, however, considered the legal effect of Hrin's requirement that the defendant put on evidence to disabuse Hrin of this opinion. This latter requirement raises a presumption of partiality as a matter of law, and therefore does not implicate 28 U.S.C. §2254 (d). *Cf. Smith v. Phillips*, 455 U.S. 209, 218 (1982) (in which no such presumption by operation of law applied): *see id.* at 222 n.* (O'Connor, J., concurring).

V.

The sixth amendment guarantees to each defendant a fair and impartial trial by a jury of his or her peers. The right to trial by impartial jury, old as the Magna Carta, is fundamental to our system of justice. *See Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968). Consistency with this constitutional provision requires that each juror lay aside a prior perception or opinion and "render

a verdict based on the evidence presented in court." *Irvin v. Dowd, supra*, 366 U.S. at 723. Consequently, no juror may enter the jury box with an opinion that can be changed only upon the presentation of evidence by the defense. Juror Hrin admitted to requiring such evidence, and therefore could not constitutionally sit in judgment of Yount. Accordingly, while I dissent from the view expressed in Judge Hunter's opinion that a change of venue was constitutionally required, I concur in the judgment of the court, which directs that the writ of habeas corpus be issued unless Yount is retried within a reasonable time. I do so, however, only for the reason that Juror Hrin was improperly seated.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5372

JON E. YOUNT, Appellant

vs.

ERNEST S. PATTON, SUPERINTENDENT, SCI—
CAMP HILL, and HARVEY BARTLE III, ATTORNEY
GENERAL OF THE COMMONWEALTH OF PENN-
SYLVANIA

(D. C. Civil No. 81-234)

On Appeal From the United States District Court for the
Western District of Pennsylvania

Present: HUNTER and GARTH*, *Circuit Judges*, and
STERN, *District Judge***

* Judge Garth took part in oral argument and in conference in this case. Thereafter he became ill. He will file a separate opinion at a later date.

** Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel December 17, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 22, 1982 be, and the same is, hereby affirmed insofar as the order of said District Court held that petitioner's constitutional right against self-incrimination was not violated by the admission into evidence of his oral statements, vacated insofar as it held that retrial in Clearfield County did not infringe petitioner's right to a fair trial by an impartial jury, and the cause remanded to the District Court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth shall afford petitioner a new trial.

No. 82-5372
May 10, 1983

ATTEST:

(s) Sally Mrvos
Clerk

May 10, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether pre-trial publicity of Respondent's re-trial infringed on his ability to select and impanel a fair and impartial jury in light of the provisions of the Sixth Amendment to the Constitution of the United States.

2. Whether a federal court in reviewing a state court conviction by way of a habeas corpus petition may disregard the sworn testimony of jurors to remain impartial and find that the defendant was denied a fair trial on the basis that the jurors were biased by pre-trial publicity.

3. Whether the federal court of appeals improperly applied the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), as to juror prejudice to a state court conviction thereby violating the holding set forth in *Murphy v. Florida*, 421 U.S. 794 (1975).

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit has not yet been reported. It is, however, set forth in the Appendix at 1a.

The opinion of the United States District Court for the Western District of Pennsylvania is reported at 537 F. Supp. 873 (W.D. Pa., 1982), and is set forth in the Appendix at 54a.

The opinion of the Supreme Court of Pennsylvania is reported at 455 Pa. 303, 314 A.2d 242 (1974), and is set forth in the Appendix at 82a.

STATEMENT OF JURISDICTION

On April 22, 1982, the United States District Court for the Western District of Pennsylvania denied Respondent's petition for a writ of habeas corpus with prejudice. Respondent appealed this order to the United States Court of Appeals for the Third Circuit which on May 10, 1983 vacated the judgment of the District Court and directed that the writ of habeas corpus should be granted unless the Commonwealth affords Yount with a new trial within a reasonable period of time. From such an order granting a new trial, the Petitioners now file a petition for writ of certiorari with this Court.

On May 25, 1983, pursuant to motion of the Petitioners herein and Rule 41 (b) of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Third Circuit entered an order staying issuance of the certified judgment to June 30, 1983. It was further stated that if during the period of the stay it received notification from the Clerk of the Supreme Court that a petition for writ of certiorari had been filed, the stay would continue until final disposition by the Supreme Court.

The jurisdiction of the Supreme Court to review the decision of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision which is involved in the instant matter being the Sixth Amendment to the United States Constitution which provides:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, a senior at Dubois Area High School who resided near Luthersburg, Pennsylvania was found in a wooded area adjoining a red-dog road leading from her school bus stop to her rural home. The autopsy revealed that the cause of death was due to shock, loss of blood and strangulation due to an excess of blood in her lungs. Examination revealed numerous wounds about the girl's head caused by a blunt weapon, three slashes across her throat and cuts of the fingers on her left hand, caused by a sharp instrument. When found, the girl's body was not fully clothed, in that one stocking and one shoe had been removed and the stocking tied about her neck.

Respondent, Jon E. Yount, was arrested April 29, 1966, on charges of murder and rape filed to No. 2 May Sessions 1966 in the Court of Quarter Sessions of Clearfield County, Pennsylvania. The case proceeded to trial on September 28, 1966, and on October 7, 1966, the Respondent was pronounced guilty by jury verdict of murder of the first degree and rape. The jury further pronounced sentence as life imprisonment. Following the denial of post-trial motions, Respondent appealed from the judgment of sentence to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania reversed the conviction and ordered a new trial on the basis of *Miranda v. State of Arizona*, 384 U.S. 436 (1966), which had been decided in the period of time between the date of Respondent's arrest and the date of trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969). The Common-

wealth appealed the ruling of the Pennsylvania Supreme Court with certiorari having been denied at 397 U.S. 925 (1970).

Prior to retrial, hearings were held on or about June 4, 1970, July 29, 1970 and August 17, 1970 with regard to Respondent's pre-trial motions as to change of venue on the basis of inability to select a fair and impartial jury and suppression of confessions and evidence obtained therefrom. The Court by memorandum and order filed September 21, 1970 denied the change of venue request and indicated that it would be bound by the guidelines as to suppression of evidence as set forth by the Supreme Court of Pennsylvania in its opinion rendered in the instant case found at *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), *cert. denied*, 397 U.S. 925 (1970).

Jury selection for the retrial commenced on November 4, 1970, with the actual trial beginning on November 17, 1970. A second petition for change of venue was filed on November 13, 1970, during jury selection for the instant case, but was denied by memorandum and order of the Court dated November 14, 1970. On November 20, 1970 the jury returned a verdict of guilty of murder of the first degree. The rape charge was not tried by the Commonwealth at retrial. After denial of post-trial motions, the Respondent was formally sentenced on March 26, 1973. The judgment of sentence was appealed to the Supreme Court of Pennsylvania. That Court by opinion found at *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974), affirmed the judgment of sentence finding that Respondent had not been denied his right to a fair and impartial jury.

The Respondent, pursuant to 28 U.S.C. §2254, filed a petition for writ of habeas corpus pro se with the United

States District Court for the Western District of Pennsylvania on or about January 5, 1981. One issue within the habeas corpus petition dealt with whether Respondent had been able to select a fair and impartial jury. After counsel had been appointed to represent the Respondent and an answer had been filed, evidentiary hearings were held before the Honorable Robert C. Mitchell, United States Magistrate on November 3, 1981 and December 28, 1981 at which time both parties placed testimony on record with regard to the merits of the petition.

On February 12, 1982, the Honorable Robert C. Mitchell recommended that a writ of habeas corpus issue on the basis that the respondent, herein, could not have received a fair and impartial jury trial within Clearfield County. The Petitioners herein, filed objections to the magistrate's report and recommendations on February 19, 1982. After oral argument before the Honorable Donald E. Ziegler, United States District Judge, the petition for writ of habeas corpus was denied with prejudice by opinion and order dated April 22, 1982. The District Court expressly found that Yount had not been denied his right to select and impanel a fair and impartial jury within Clearfield County. On May 10, 1983, following the filing of an appeal and the presentation of oral argument, the United States Court of Appeals for the Third Circuit vacated the judgment of the District court and held that a writ of habeas corpus should issue unless the Commonwealth affords Yount a new trial within a reasonable period of time. The reason for such being that Yount had been denied his right to a fair trial by an impartial jury. The Petitioners now file this petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit.

REASONS FOR ALLOWANCE OF THE WRIT OF
CERTIORARI

The instant case presents to this Court a matter in which the United States Court of Appeals for the Third Circuit has rendered a decision on a federal question in conflict with that reached by the Supreme Court of Pennsylvania. Further, the Court of Appeals decision appears to be in conflict with the holding of this Court in *Murphy v. Florida*, 421 U.S. 794 (1975).

The Respondent herein, Jon E. Yount, was convicted in 1970, after retrial in the Court of Common Pleas of Clearfield County, Pennsylvania of the offense of murder of the first degree. Within his post-trial motions and appeal to the Supreme Court of Pennsylvania, Yount raised the issue that his Sixth Amendment right to select a fair and impartial jury had been infringed upon by the pre-trial publicity to which the venire had been exposed. The Supreme Court of Pennsylvania in applying the test established by this Court in *Irvin v. Dowd*, 366 U.S. 717 (1961), found that: "These findings (no excessive pre-trial publicity) fully supported by the record, do not sustain appellant's claim, and the Court properly denied appellant's motion for a change of venue predicated on this theory." *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974). The Court further stated, quoting *Irvin v. Dowd*, that: "Neither does the voir dire, as appellant argues, reveal a 'clear and convincing build-up of prejudice or a "pattern of deep and bitter prejudice" shown . . . throughout the community' which would require a change

of venue. *Irvin v. Dowd*, 366 U.S. 717, 725, 727, 81 S.Ct. 1639, 1644, 1645 [6 L.Ed. 2d 751] (1961).” *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974).

In 1981, some ten (10) years after his conviction, the Respondent began the instant writ of habeas corpus action seeking to challenge his conviction and the decision made by the Supreme Court of Pennsylvania. When reviewing on assertion as to pre-trial publicity and change of venue in a habeas corpus proceeding from a state conviction, the federal court’s review narrows considerably. “A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has ‘utterly corrupted’ the trial. (Emphasis added.) *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2034, 44 L.Ed. 2d 589 (1974). See also *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed. 2d 344 (1977).” *Martin v. Warden*, 653 F.2d 799, 805 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

The United States District Court for the Western District of Pennsylvania after oral argument and review of the record of both the trial court and the federal magistrate found that Yount had failed to establish “publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County, or that the coverage utterly corrupted the judicial process.” *Yount v. Patton*, 537 F. Supp. 873, 877 (1982). The District Court further noted that under the teaching of *Sumner v. Mata*, 449 U.S. 539 (1981), the findings of a state court judge as to the impact of pre-trial publicity are to be held presumptively correct. See also 28 U.S.C. §2254 (d).

The law seems well settled that, "Pre-trial publicity exposure will not automatically taint a juror." *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir., 1980), *cert. denied*, 449 U.S. 899 (1980). *Martin v. Warden*, 653 F.2d 799, 804 (3d Cir., 1981), *cert. denied*, 454 U.S. 1151 (1982). "Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based on the evidence presented at trial." *United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir., 1980), *cert. denied*, 449 U.S. 899 (1980). See also *Irvin v. Dowd*, 366 U.S. 717, 723 (1961), *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

With regard to the instant case, the record of voir dire at the second trial indicates that of the twelve (12) jurors who actually served on the panel, which heard Yount's case, nine (9) were accepted for the jury by both the Commonwealth and the defense *without challenges of any form* being made. Each one of these nine persons indicated that they had no opinion as to Yount's guilt or innocence. Of the three (3) persons who were challenged, two (2) indicated they had no opinion whatsoever and the remaining one (1), although stating he had an opinion, indicated he would enter the jury box with an open mind and that his verdict would be based on the evidence presented at trial. The voir dire fails to demonstrate the actual existence of such an opinion in the minds of any one of the jurors such as would evidence or bring about the partiality of the panel.

Regardless of the sworn testimony during voir dire, the United States Court of Appeals for the Third Circuit in finding contrary to the Supreme Court of Pennsylvania

and the United States District Court for the Western District of Pennsylvania held that "... despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County." *Yount v. Patton*, Appendix at page 32a. The Court of Appeals, by its holding, is applying the standards originally set forth in *Marshall v. United States*, 360 U.S. 310 (1959). The *Marshall* standard clearly allows for a federal court to find that when persons learn from news sources information with a high potential for prejudice such persons may be presumed to be prejudiced despite their assurance that they could remain impartial. Under the federal system, the representations of the jury members at Yount's trial, even though under oath, may be set aside.

The *Marshall* standard, however, is wholly inapplicable to a state court proceeding. *Murphy v. Florida*, 421 U.S. 794, 798 (1975). *Martin v. Warden*, 653 F.2d 799, 804-805 (3d Cir., 1981), *cert. denied*, 454 U.S. 1151 (1982). Justice Marshall in *Murphy* stated: "In the face of so clear a statement, it cannot be maintained that *Marshall* was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States. . . . We cannot agree that *Marshall* has any application beyond the federal courts." *Murphy v. Florida*, 421 U.S. 794, 799 (1975).

The decision rendered by the United States Court of Appeals for the Third Circuit is therefore not only contrary to that previously reached by the Supreme Court of Pennsylvania and the United States District Court for the Western District of Pennsylvania but further is contrary to

the holding of this Court in *Murphy v. Florida*, 421 U.S. 794 (1975). The evidence presented as to publicity about the instant case, although indicating that the case was indeed publicized, does not evidence that the publicity was so extreme as to cause actual prejudice or that the publicity utterly corrupted the judicial process such that a fair and impartial jury could not be impaneled. The sworn testimony of the jurors may not be disregarded.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
Thomas F. Morgan,
District Attorney of
Clearfield County
Counsel for Petitioners

[Note: Appendix omitted, said documents appearing elsewhere herein.]

IN THE SUPREME COURT OF THE UNITED
STATES

1983 TERM

No. 83-95

Ernest S. Patton, Superintendent, SCI—Camp Hill,
and Harvey Bartle, III, Attorney General of the Com-
monwealth of Pennsylvania,

Petitioners

v.

Jon E. Yount,

Respondent

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE E. SCHUMACHER

Federal Public Defender

590 Centre City Tower

650 Smithfield Street

Pittsburgh, Pennsylvania 15222

412/644-6565

FTS/722-6565

Counsel for respondent,

Jon E. Yount

The respondent, Jon E. Yount, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion of May 10, 1983 in this case.

QUESTIONS PRESENTED

1. Whether publicity before respondent's retrial revealed prejudicial information from his first trial, information that was not officially in evidence against him at retrial, which poisoned the general atmosphere of the community and, therefore, caused an actual prejudice in the jurors that infringed on his ability to select and impanel a fair and impartial jury as required by the Sixth Amendment to the Constitution of the United States. (Answered in the affirmative by the United States Court of Appeals for the Third Circuit).

2. Whether a federal court, in reviewing a state court conviction by way of a habeas corpus petition, may independently evaluate the mixed question of law and fact regarding a veniremen's opinion, and as a result of that independent evaluation, disregard jurors' equivocal assurances of impartiality and find that the defendant was denied a fair and impartial jury as required by the Sixth Amendment to the Constitution of the United States. (Answered in the affirmative by the United States Court of Appeals for the Third Circuit).

3. Whether the United States Court of Appeals for the Third Circuit properly applied to a state court conviction the standards regarding juror prejudice set forth in *Murphy v. Florida*, 421 U.S. 794 (1975). (Respondent respectfully submits the answer to this question to be in the affirmative).

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, an 18-year-old senior at DuBois Area High School, was found shortly after her death in a wooded area near her home in Luthersburg, Clearfield County, Pennsylvania. There were several non-fatal wounds about her head, apparently caused by a blunt instrument, and cuts on her neck, throat and fingers of her left hand caused by a sharp instrument. An autopsy showed that she had died of strangulation when blood from the neck and throat wounds was drawn into her lungs. Except for a stocking, which was tied loosely around her neck, and a shoe, she remained fully clothed; the autopsy revealed no indication that she had been sexually assaulted.

Respondent, Jon E. Yount, surrendered to the Pennsylvania State Police and was arrested on April 29, 1966, on a charge of murder and rape. He was convicted on October 7, 1966, of first-degree murder and rape in the Court of Oyer and Terminer and General Jail Delivery of Clearfield County; the jury pronounced sentence as life imprisonment. The trial court denied post-trial motions; on direct appeal the Pennsylvania Supreme Court determined that respondent had not received adequate warnings against self-incrimination, reversed the judgment of sentence and granted a new trial. *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969), cert denied, 397 U.S. 925 (1970).

On May 5, 1970, respondent requested a change of venue for retrial claiming that publicity that had

saturated the county since the homicide, the continuing discussion of the case among residents, and the dissemination of prejudicial information outside of evidence was so widespread that prejudice against him could not be eradicated from the minds of potential jurors. The trial court denied the petition for change of venue on September 21, 1970, finding that after the initiation of the appeal the newspapers had merely publicized the actions of the courts "without editorial comment of any kind."

Jury selection for the retrial began on November 4, 1970 and took eleven days, seven jury panels and 1186 pages of testimony. Respondent orally moved for a change of venue following the exhaustion of each panel of jurors; each motion was orally denied by the trial court. On November 13, 1970, a second petition for change of venue was filed by respondent during jury selection; however, the trial court, following a hearing, denied the motion by memorandum and order of the court dated November 14, 1970, stating that "almost all, if not all, jurors seated had no prior or present fixed opinions."

The rape charge against respondent was quashed; retrial for murder began November 17, 1970, and on November 20, 1970, the jury returned a verdict of guilty of murder of the first degree. The trial court denied post-trial motions and the Pennsylvania Supreme Court affirmed the judgment of sentence on direct appeal. *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974).

On January 5, 1981, respondent filed a petition for writ of habeas corpus in the United States District Court alleging, inter alia, that his conviction had been

obtained in violation of his sixth and fourteenth amendment right to a fair trial by an impartial jury. Following two evidentiary hearings on November 3 and December 28, 1981, the federal magistrate recommended that the petition be granted because respondent had been denied a fair and impartial jury. On April 22, 1982, the district court rejected the magistrate's recommendation and denied the petition. *Yount v. Patton*, 537 F.Supp. 873 (W.D. Pa. 1982).

Respondent filed a notice of appeal with the United States Court of Appeals for the Third Circuit; oral arguments were held on December 17, 1982, and on May 10, 1983, that court held that he had shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County, vacated the district court's order and remanded the case to the district court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth affords respondent a new trial.

REASONS WHY THE WRIT SHOULD BE DENIED

The Sixth Amendment to the Constitution of the United States guarantees to the accused the right to be tried "by an impartial jury." Under the Due Process Clause of the Fourteenth Amendment, the states are required to effectuate that right by giving "a fair trial to the accused by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Petitioner attempts to circumvent evidence that pre-

retrial radio, television and newspaper coverage regarding extra-record information had so prejudiced the community of Clearfield County against the accused that a fair trial by an impartial and "indifferent" jury was impossible in that charged atmosphere. The United States Court of Appeals for the Third Circuit, when considering respondent's contention that pretrial publicity had instilled an actual prejudice in the minds of jurors in this case, noted that the exclusion at retrial of information regarding his first trial such as his conviction by a community jury of the murder, his written confessions and trial testimony, his plea of temporary insanity, and his conviction of rape was meaningless when the news media made it available to the public and poisoned the general atmosphere of the community. See *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966).

The trial court responded to the defendant's allegation that this publicity had prejudiced the jurors against him by stating that "almost all, if not all, [of the first twelve jurors] jurors ... had no prior or present fixed opinions." The Supreme Court of Pennsylvania summarily affirmed this equivocal finding of the trial judge with the general conclusion, absent specific factual findings or references to the record, that "these findings, fully supported by the record, do not sustain appellant's claim ..." and that "the record fails to disclose undue community prejudice." *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247-248 (1974). The state's highest court went on to note, without reference to statistical analysis or specific voir dire testimony, that "neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of prejudice or a 'pattern of deep and bitter prejudice

shown' ... throughout the community which would require a change of venue." The common standards applied by Pennsylvania courts when exercising sound discretion to a request for a change of venue are:

- a. Whether pretrial publicity was factual and objective or inflammatory and slanted;
- b. Whether pretrial publicity revealed the existence of accused's prior criminal record;
- c. Whether pretrial publicity referred to confessions, admissions or reenactments of the crime by defendant;
- d. Whether such information was made available by the police and prosecutorial officers; and
- e. The extent of saturation and whether a period of "cooling-off" had occurred.

Commonwealth v. Cohen, 413 A.2d 1066, 489 Pa. 167 (1980), cert denied, 101 S.Ct. 118; *Commonwealth v. Frazier*, 369 A.2d 1224, 471 Pa. 121 (1977). However, the record in this case does not indicate that the trial court considered any but the first and last of these standards. The Supreme Court of Pennsylvania failed to provide any insight into how it arrived at its conclusion to affirm the trial court's findings; certainly, there is no evidence that any but the last of these standards was considered. *Commonwealth v. Yount*, 314 A.2d at 247.

Faced with a limited record of factual findings by the state courts, the federal magistrate held two evidentiary hearings on this issue, found that "strong community hostility toward petitioner" existed as well as "pervasive community knowledge of the facts of this case," and concluded that the empanelled jury was in-

capable of deciding the case solely on the evidence before it "but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." The United States District Court refused the magistrate's recommendation. *Yount v. Patton*, 537 F. Supp. 873 (1982).

Because Yount was challenging a state conviction in a petition for writ of habeas corpus, the Court of Appeals, citing this Court's holding that the factual findings of the state courts are presumed to be correct unless shown to be erroneous by convincing evidence, see *Sumner v. Mata*, 449 U.S. 539 (1981), specifically recognized its duty as a federal appellate court to examine the "totality of the circumstances" for any indication that respondent's trial was not fundamentally fair and to "independently evaluate the voir dire testimony of the empanelled jurors and the potential jurors." See *Dobbert v. Florida*, 432 U.S. 282, 303 (1977). The court below not only was permitted by federal law (28 United States Code, Section 2254(d)) to review the mixed question of law and fact presented by the nature of a challenge to a venireman's opinion but was also obligated to conduct an independent evaluation of the record of the case. *Irvin v. Dowd, Warden*, 366 U.S. 717, 723 (1960). *Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980).

Upon reviewing the record, the Court of Appeals found that respondent exhausted his peremptory challenges during voir dire; that 126 of 163 veniremen (80%) questioned on the case were willing to admit on voir dire that they would carry their opinion into the jury box; that attempts had been made to veil strong opinions and to influence votes among veniremen; that

the publicity had reached all but one of the twelve jurors and two alternates finally empanelled; that several seated jurors specifically recalled the accused's conviction or confessions, that eight of fourteen jurors would admit that before hearing any testimony they had formed an opinion as to his guilt or innocence, and that jurors gave uncertain and ambiguous answers when asked if they could forget what they had heard and put their opinions aside. The court noted that "even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went 'so far as to say that it would take evidence to overcome their belief ... *Murphy*, 421 U.S. at 798."

The court below clearly rejected application of the standards cited in *Marshall v. United States*, 360 U.S. 310 (1959) to this case and dutifully applied the oft-cited requirements of 28 United States Code, Section 2254(d) and *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031 (1974), to its in-depth, independent review of the record. Recognizing the statistical similarity between this "cause celebre" case and *Irvin*, the Court of Appeals noted that "a juror's assurance that he can enter the jury box without an opinion is not dispositive if the accused can demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' *Murphy*, 421 U.S. at 800;" upon consideration of the extent and content of the publicity because it is indicative of the then-current community pattern of thought, review of the voir dire for opinions expressed by potential jurors and the difficulty encountered in finding veniremen who could at least claim impartiality, and, finally, discovery of a pattern of prejudice reflected in the

testimony of jurors ultimately seated in the jury box, the court concluded that the jurors' assurances of impartiality had to be discounted. The Court of Appeals, responding to the factual findings of the trial court, rejected those findings and held that "petitioner has established that the publicity before his second trial had revealed prejudicial information from his first trial, information which was not officially in evidence against him" and that he "has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County."

Finally, the court below considered the question of law regarding the trial court's refusal to dismiss jurors for cause who had expressed a disqualifying prejudice and concluded that "the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice and permitted some of them to sit as jurors." Noting respondent's reasons for not challenging for cause nine of the seated jurors, the court held that "where as here a fair trial was impossible not because of a particular juror but regardless of the particular jurors, challenge of any individual juror for cause is not required." However, Judge Garth, concluded that the voir dire testimony of challenged juror, Hrin, demonstrated the actual existence of disqualifying prejudice in the mind of one of the jurors "as will raise the presumption of partiality..." Judge Garth determined that Juror Hrin's admission of a requirement of evidence to change his preconceived opinion of the defendant's guilt, as a matter of law, raises a presumption of partiality. "A defendant cannot constitutionally be convicted by a jury containing one such juror. *Irvin v. Dowd*, *supra*, 366 U.S. at 723."

The United States Court of Appeals for the Third Circuit was correct in its conclusion that pretrial publicity poisoned the general atmosphere in Clearfield County so as to create an actual prejudice in the jurors deciding this case that infringed on respondent's ability to select and impanel a fair and impartial jury. The Court was obligated to independently review and evaluate the questions of law and fact relevant to the issue of opinions of veniremen and, if that investigation warranted, disregard the jurors' equivocal assurances of impartiality. In doing so, the court strictly adhered to the standards regarding juror prejudice as set forth in *Murphy*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the opinion of the circuit court, should be denied.

Respectfully submitted,

(s) George E. Schumacher

George E. Schumacher

Federal Public Defender

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Attorney for respondent

Jon E. Yount

[Certificate of Service Omitted]

Oct. 24, 1983

SUPREME COURT OF THE UNITED STATES

No. 83-95

Ernest S. Patton, Superintendent, SCI—Camp Hill
and Harvey Bartle, III, Attorney General of Pennsylvania,

Petitioners,

v.

Jon E. Yount

ORDER ALLOWING CERTIORARI. Filed *October 17, 1983.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Third Circuit* is granted.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
1983 TERM

Office - Supreme Court FILED AUG 18 1983 ALEXANDER L. STEVENS CLERK

No. 83-95

ERNEST S. PATTON, Superintendent,
SCI-CAMP HILL, and HARVEY BARTLE, III,
Attorney General of the Commonwealth
of Pennsylvania,

Petitioners

v.

JON E. YOUNT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE E. SCHUMACHER
Federal Public Defender

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Counsel for respondent,
JON E. YOUNT

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.	ii
Questions Presented	1
Statement of the Case	3
Reasons Why the Writ Should Be Denied	6
Conclusion.	12
Certificate of Service.	13

TABLE OF AUTHORITIES

Page

Cases:

Commonwealth v. Cohen	
413 A.2d 1066, 489 Pa. 167 (1980)	
cert denied, 101 S.Ct. 118.	7
Commonwealth v. Frazier	
369 A.2d 1224, 471 Pa. 121 (1977)	7
Commonwealth v. Yount	
435 Pa. 276, 256 A.2d 464 (1969)	
cert denied, 397 U.S. 925 (1970).	3
Commonwealth v. Yount	
455 Pa. 303, 314 A.2d 242, 247-248 (1974)	4, 7
Cuyler v. Sullivan	
446 U.S. 335, 341-42 (1980)	8
Dobbert v. Florida	
432 U.S. 282, 303 (1977).	8
Irvin v. Dowd, Warden	
366 U.S. 717, 723 (1960).	6, 8, 9, 10
Marshall v. United States	
360 U.S. 310 (1959)	9
Murphy v. Florida	
421 U.S. 794, 95 S.Ct. 2031 (1974).	2, 9, 11
Sheppard v. Maxwell	
384 U.S. 33, 360 (1966)	6
Sumner v. Mata	
449 U.S. 539 (1981)	8
Yount v. Patton	
537 F.Supp. 873 (W.D.Pa. 1982).	5, 8

Statutes:

28 United States Code, Section 2254(d)	9
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No. 83-95
IN THE SUPREME COURT OF THE UNITED STATES
1983 TERM

ERNEST S. PATTON, Superintendent,
SCI-CAMP HILL, and HARVEY BARTLE, III,
Attorney General of the Commonwealth
of Pennsylvania,

Petitioners

v.

JON E. YOUNT,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Jon E. Yount, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion of May 10, 1983 in this case.

QUESTIONS PRESENTED

1. WHETHER PUBLICITY BEFORE RESPONDENT'S RETRIAL REVEALED PREJUDICIAL INFORMATION FROM HIS FIRST TRIAL, INFORMATION THAT WAS NOT OFFICIALLY IN EVIDENCE AGAINST HIM AT RETRIAL, WHICH POISONED THE GENERAL ATMOSPHERE OF THE COMMUNITY AND, THEREFORE, CAUSED AN ACTUAL PREJUDICE IN THE JURORS THAT INFRINGED ON HIS ABILITY TO SELECT AND IMPANEL A FAIR AND IMPARTIAL JURY AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. (ANSWERED IN THE AFFIRMATIVE BY THE UNITED STATES COURT OF APPEALS FOR THE

THIRD CIRCUIT).

2. WHETHER A FEDERAL COURT, IN REVIEWING A STATE COURT CONVICTION BY WAY OF A HABEAS CORPUS PETITION, MAY INDEPENDENTLY EVALUATE THE MIXED QUESTION OF LAW AND FACT REGARDING A VENIREMEN'S OPINION, AND AS A RESULT OF THAT INDEPENDENT EVALUATION, DISREGARD JURORS' EQUIVOCAL ASSURANCES OF IMPARTIALITY AND FIND THAT THE DEFENDANT WAS DENIED A FAIR AND IMPARTIAL JURY AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(ANSWERED IN THE AFFIRMATIVE BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT).

3. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED TO A STATE COURT CONVICTION THE STANDARDS REGARDING JUROR PREJUDICE SET FORTH IN MURPHY v. FLORIDA, 421 U.S. 794 (1975). (RESPONDENT RESPECTFULLY SUBMITS THE ANSWER TO THIS QUESTION TO BE IN THE AFFIRMATIVE).

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, an 18-year-old senior at DuBois Area High School, was found shortly after her death in a wooded area near her home in Luthersburg, Clearfield County, Pennsylvania. There were several non-fatal wounds about her head, apparently caused by a blunt instrument, and cuts on her neck, throat and fingers of her left hand caused by a sharp instrument. An autopsy showed that she had died of strangulation when blood from the neck and throat wounds was drawn into her lungs. Except for a stocking, which was tied loosely around her neck, and a shoe, she remained fully clothed; the autopsy revealed no indication that she had been sexually assaulted.

Respondent, Jon E. Yount, surrendered to the Pennsylvania State Police and was arrested on April 29, 1966, on a charge of murder and rape. He was convicted on October 7, 1966, of first-degree murder and rape in the Court of Oyer and Terminer and General Jail Delivery of Clearfield County; the jury pronounced sentence as life imprisonment. The trial court denied post-trial motions; on direct appeal the Pennsylvania Supreme Court determined that respondent had not received adequate warnings against self-incrimination, reversed the judgment of sentence and granted a new trial. Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969), cert denied, 397 U.S. 925 (1970).

On May 5, 1970, respondent requested a change of venue for retrial claiming that publicity that had saturated the county since the homicide, the continuing discussion of the case among residents, and the dissemination of prejudicial information outside of evidence was so widespread that prejudice against him could not be eradicated from the minds of potential jurors. The trial court denied the petition for change of venue on September 21, 1970, finding that

after the initiation of the appeal the newspapers had merely publicized the actions of the courts "without editorial comment of any kind."

Jury selection for the retrial began on November 4, 1970 and took eleven days, seven jury panels and 1186 pages of testimony. Respondent orally moved for a change of venue following the exhaustion of each panel of jurors; each motion was orally denied by the trial court. On November 13, 1970, a second petition for change of venue was filed by respondent during jury selection; however, the trial court, following a hearing, denied the motion by memorandum and order of the court dated November 14, 1970, stating that "almost all, if not all, jurors seated had no prior or present fixed opinions."

The rape charge against respondent was quashed; retrial for murder began November 17, 1970, and on November 20, 1970, the jury returned a verdict of guilty of murder of the first degree. The trial court denied post-trial motions and the Pennsylvania Supreme Court affirmed the judgment of sentence on direct appeal. Commonwealth v. Yount, 455 Pa. 303, 314 A.2s 242 (1974).

On January 5, 1981, respondent filed a petition for writ of habeas corpus in the United States District Court alleging, inter alia, that his conviction had been obtained in violation of his sixth and fourteenth amendment right to a fair trial by an impartial jury. Following two evidentiary hearings on November 3 and December 28, 1981, the federal magistrate recommended that the petition be granted because respondent had been denied a fair and impartial jury. On April 22, 1982, the district court rejected the magistrate's recommendation and denied the

petition. Yount v. Patton, 537 F.Supp. 873 (W.D.Pa. 1982).

Respondent filed a notice of appeal with the United States Court of Appeals for the Third Circuit; oral arguments were held on December 17, 1982, and on May 10, 1983, that court held that he had shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County, vacated the district court's order and remanded the case to the district court with the direction that a writ of habeas corpus shall issue unless within a reasonable time the Commonwealth affords respondent a new trial.

REASONS WHY THE WRIT SHOULD BE DENIED

The Sixth Amendment to the Constitution of the United States guarantees to the accused the right to be tried "by an impartial jury." Under the Due Process Clause of the Fourteenth Amendment, the states are required to effectuate that right by giving "a fair trial to the accused by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Petitioner attempts to circumvent evidence that pre-trial radio, television and newspaper coverage regarding extra-record information had so prejudiced the community of Clearfield County against the accused that a fair trial by an impartial and "indifferent" jury was impossible in that charged atmosphere. The United States Court of appeals for the Third Circuit, when considering respondent's contention that pre-trial publicity had instilled an actual prejudice in the minds of jurors in this case, noted that the exclusion at retrial of information regarding his first trial such as his conviction by a community jury of the murder, his written confessions and trial testimony, his plea of temporary insanity, and his conviction of rape was meaningless when the news media made it available to the public and poisoned the general atmosphere of the community. See Sheppard v. Maxwell, 384 U.S. 333, 360 (1966).

The trial court responded to the defendant's allegation that this publicity had prejudiced the jurors against him by stating that "almost all, if not all, [of the first twelve jurors] jurors...had no prior or present fixed opinions." The Supreme Court of Pennsylvania summarily affirmed this equivocal finding of the trial judge with the general conclusion, absent specific factual findings or references to the record, that "these findings, fully supported by the record, do not sustain appellant's claim..."

and that "the record fails to disclose undue community prejudice." Commonwealth v. Yount, 455 Pa. 303, 314 A.2d 242, 247-248 (1974). The state's highest court went on to note, without reference to statistical analysis or specific voir dire testimony, that "neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of prejudice or a 'pattern of deep and bitter prejudice shown'...throughout the community which would require a change of venue." The common standards applied by Pennsylvania courts when exercising sound discretion to a request for a change of venue are:

- a. Whether pretrial publicity was factual and objective or inflammatory and slanted;
- b. Whether pretrial publicity revealed the existence of accused's prior criminal record;
- c. Whether pretrial publicity referred to confessions, admissions or reenactments of the crime by defendant;
- d. Whether such information was made available by the police and prosecutorial officers; and
- e. The extent of saturation and whether a period of "cooling-off" had occurred.

Commonwealth v. Cohen, 413 A.2d 1066, 489 Pa. 167 (1980), cert denied, 101 S.Ct. 118; Commonwealth v. Frazier, 369 A.2d 1224, 471 Pa. 121 (1977). However, the record in this case does not indicate that the trial court considered any but the first and last of these standards. The Supreme Court of Pennsylvania failed to provide any insight into how it arrived at its conclusion to affirm the trial court's findings; certainly, there is no evidence that any but the last of these standards was considered. Commonwealth v. Yount, 314 A.2d at 247.

Faced with a limited record of factual findings by the state courts, the federal magistrate held two evidentiary hearings on this issue, found that "strong community hostility toward petitioner" existed as well as "pervasive

community knowledge of the facts of this case," and concluded that the empanelled jury was incapable of deciding the case solely on the evidence before it "but rather at best required the petitioner to prove his innocence or at least overcome strong preconceived notions as to his guilt." The United States District Court refused the magistrate's recommendation. Yount v. Patton, 537 F.Supp. 873 (1982).

Because Yount was challenging a state conviction in a petition for writ of habeas corpus, the Court of Appeals, citing this Court's holding that the factual findings of the state courts are presumed to be correct unless shown to be erroneous by convincing evidence, see Sumner v. Mata, 449 U.S. 539 (1981), specifically recognized its duty as a federal appellate court to examine the "totality of the circumstances" for any indication that respondent's trial was not fundamentally fair and to "independently evaluate the voir dire testimony of the empanelled jurors and the potential jurors." See Dobbert v. Florida, 432 U.S. 282, 303 (1977). The court below not only was permitted by federal law (28 United States Code, Section 2254(d)) to review the mixed question of law and fact presented by the nature of a challenge to a venireman's opinion but was also obligated to conduct an independent evaluation of the record of the case. Irvin v. Dowd, Warden, 366 U.S. 717, 723 (1960). Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980).

Upon reviewing the record, the Court of Appeals found that respondent exhausted his peremptory challenges during voir dire; that 126 of 163 veniremen (80%) questioned on the case were willing to admit on voir dire that they would carry their opinion into the jury box; that attempts had been made to veil strong opinions and to influence votes among veniremen; that the publicity had reached all but one of the twelve jurors and two alternates finally em-

panelled; that several seated jurors specifically recalled the accused's conviction or confessions, that eight of fourteen jurors would admit that before hearing any testimony they had formed an opinion as to his guilt or innocence, and that jurors gave uncertain and ambiguous answers when asked if they could forget what they had heard and put their opinions aside. The court noted that "even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went 'so far as to say that it would take evidence to overcome their belief'...Murphy, 421 U.S. at 798."

The court below clearly rejected application of the standards cited in Marshall v. United States, 360 U.S. 310 (1959) to this case and dutifully applied the oft-cited requirements of 28 United States Code, Section 2254(d) and Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1974), to its in-depth, independent review of the record. Recognizing the statistical similarity between this "cause celebre" case and Irvin, the Court of Appeals noted that "a juror's assurance that he can enter the jury box without an opinion is not dispositive if the accused can demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.' Murphy, 421 U.S. at 800;" upon consideration of the extent and content of the publicity because it is indicative of the then-current community pattern of thought, review of the voir dire for opinions expressed by potential jurors and the difficulty encountered in finding veniremen who could at least claim impartiality, and, finally, discovery of a pattern of prejudice reflected in the testimony of jurors ultimately seated in the jury box, the court concluded that the jurors' assurances of impartiality had to be discounted. The Court of Appeals, responding to the factual findings of the trial court, rejected those findings and held that "petitioner

has established that the publicity before his second trial had revealed prejudicial information from his first trial, information which was not officially in evidence against him" and that he "has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County."

Finally, the court below considered the question of law regarding the trial court's refusal to dismiss jurors for cause who had expressed a disqualifying prejudice and concluded that "the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice and permitted some of them to sit as jurors." Noting respondent's reasons for not challenging for cause nine of the seated jurors, the court held that "where as here a fair trial was impossible not because of a particular juror but regardless of the particular jurors, challenge of any individual juror for cause is not required." However, Judge Garth, concluded that the voir dire testimony of challenged juror, Hrin, demonstrated the actual existence of disqualifying prejudice in the mind of one of the jurors 'as will raise the presumption of partiality'..." Judge Garth determined that Juror Hrin's admission of a requirement of evidence to change his preconceived opinion of the defendant's guilt, as a matter of law, raises a presumption of partiality. "A defendant cannot constitutionally be convicted by a jury containing one such juror. Irvin v. Dowd, supra, 366 U.S. at 723."

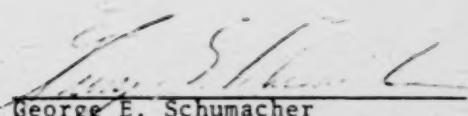
The United States Court of Appeals for the Third Circuit was correct in its conclusion that pretrial publicity poisoned the general atmosphere in Clearfield County so as to create an actual prejudice in the jurors deciding this case that infringed on respondent's ability to select and impanel a fair and impartial jury. The Court was obligated

to independently review and evaluate the questions of law and fact relevant to the issue of opinions of veniremen and, if that investigation warranted, disregard the jurors' equivocal assurances of impartiality. In doing so, the court strictly adhered to the standards regarding juror prejudice as set forth in Murphy.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the opinion of the circuit court, should be denied.

Respectfully submitted,


George E. Schumacher
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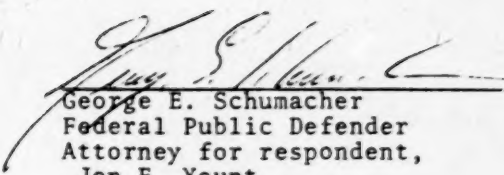
Attorney for respondent,
Jon E. Yount

CERTIFICATE OF SERVICE

I, George E. Schumacher, a member of the Bar of this Court, hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Respondent's Brief in Opposition were mailed to the following:

Thomas F. Morgan
District Attorney of Clearfield
County
P.O. Box 887
Clearfield, Pennsylvania 16830

Dated: August 12, 1983


George E. Schumacher
Federal Public Defender
Attorney for respondent,
Jon E. Yount

MOTION FILED
AUG 13 1983

ORIGINAL

No. 83-95
IN THE SUPREME COURT OF THE UNITED STATES
1983 TERM



ERNEST S. PATTON, Superintendent,
SCI-CAMP HILL, and HARVEY BARTLE, III,
Attorney General of the Commonwealth
of Pennsylvania,

Petitioners

v.

JON E. YOUNT,

Respondent

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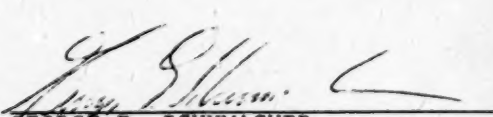
AUG 13 1983

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Respondent, Jon E. Yount, pursuant to 18 United States Code, Section 3006(d)(6) and Rule 48.1 of the United States Supreme Court, asks leave to file the attached Brief in Opposition without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office represented the petitioner in the district court and on appeal to the United States Court of Appeals for the Third Circuit.

Dated: August 11, 1983

Respectfully submitted,


GEORGE E. SCHUMACHER
Federal Public Defender

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650 Smithfield Street
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412/644-6565
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Attorney for respondent,
JON E. YOUNT

No. 83-95
IN THE SUPREME COURT OF THE UNITED STATES
1983 TERM

RECEIVED

OCT 31 1983

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ERNEST S. PATTON, Superintendent,
SCI-Camp Hill, and HARVEY BARTLE, III,
Attorney General of the Commonwealth
of Pennsylvania,

Petitioners

v.

JON E. YOUNT,

Respondent

MOTION FOR APPOINTMENT OF COUNSEL

GEORGE E. SCHUMACHER
Federal Public Defender

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650 Smithfield Street
Pittsburgh, Pennsylvania 15222

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FTS/722-6565

MOTION FOR APPOINTMENT OF COUNSEL

AND NOW comes the respondent, Jon E. Yount by his counsel, George E. Schumacher, Federal Public Defender for the Western District of Pennsylvania and moves this Honorable Court for appointment of George E. Schumacher under Rule 46 of the Rules of the Supreme Court of the United States as counsel, and as grounds therefor sets forth as follows:

1. For the educational background of George E. Schumacher, please see Exhibit "A" attached hereto.

2. George E. Schumacher has been admitted to the bars of the following courts:

- a. Common Pleas Court of Allegheny County, Pennsylvania;
- b. Superior Court of the Commonwealth of Pennsylvania;
- c. Supreme Court of the Commonwealth of Pennsylvania;
- d. United States District Court for the Western District of Pennsylvania;
- e. United States Court of Appeals for the Third Circuit; and
- f. Supreme Court of the United States.

3. For the past nine years, George E. Schumacher has served as the Federal Public Defender for the Western District of Pennsylvania by appointment of the United States Court of Appeals for the Third Circuit upon the recommendation of the district judges for the Western District of Pennsylvania.

In his capacity as Federal Public Defender, Mr. Schumacher has represented indigent clients in every conceivable type of federal criminal violation, including the trial of mail fraud conspiracy, drug violations, bank robbery and other types of cases. In addition, he has represented numerous clients in habeas corpus cases resulting from state court convictions in the Commonwealth of Pennsylvania. He has tried more than 100 criminal trials in federal court and has argued more than 50 times before the United States Court of Appeals for the Third Circuit.

Prior to his appointment as Federal Public Defender, Mr. Schumacher was in private practice for a period of approximately five years, which practice included both the trial of civil and criminal cases in both state and federal courts. During that period of time he briefed and argued cases before the United States Court of Appeals for the Third Circuit, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania.

Before entering private practice, Schumacher served for five years as an Assistant United States Attorney for the Western District of Pennsylvania. During this period of time he tried civil and criminal cases in federal court and argued cases before the United States Court of Appeals for the Third Circuit.

Prior to his employment with the U.S. Attorney's Office, Schumacher served as a law clerk to two federal court judges.

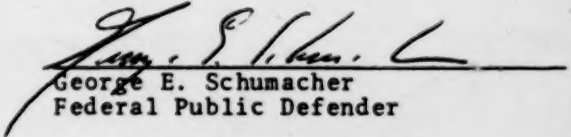
4. George E. Schumacher was appointed by Magistrate

Robert C. Mitchell to represent Jon E. Yount before the United States District Court for the Western District of Pennsylvania. Schumacher represented the respondent in hearings before Magistrate Mitchell and before the Hon. Donald E. Ziegler.

5. George E. Schumacher represented the respondent before the United States Court of Appeals for the Third Circuit in the briefing and oral argument of this case.

6. The respondent, Jon E. Yount, requests the Court to appoint George E. Schumacher, Esquire to represent him before this Honorable Court.

Respectfully submitted,


George E. Schumacher
Federal Public Defender

RESUME

GEORGE E. SCHUMACHER, B.A., L.L.B., J.D.

Education:

Bachelor of Arts	The University of Pittsburgh, June 11, 1953
Bachelor of Laws	The University of Pittsburgh, School of Law, 1961
Juris Doctor	The University of Pittsburgh, October, 1968

Admissions to Practice:

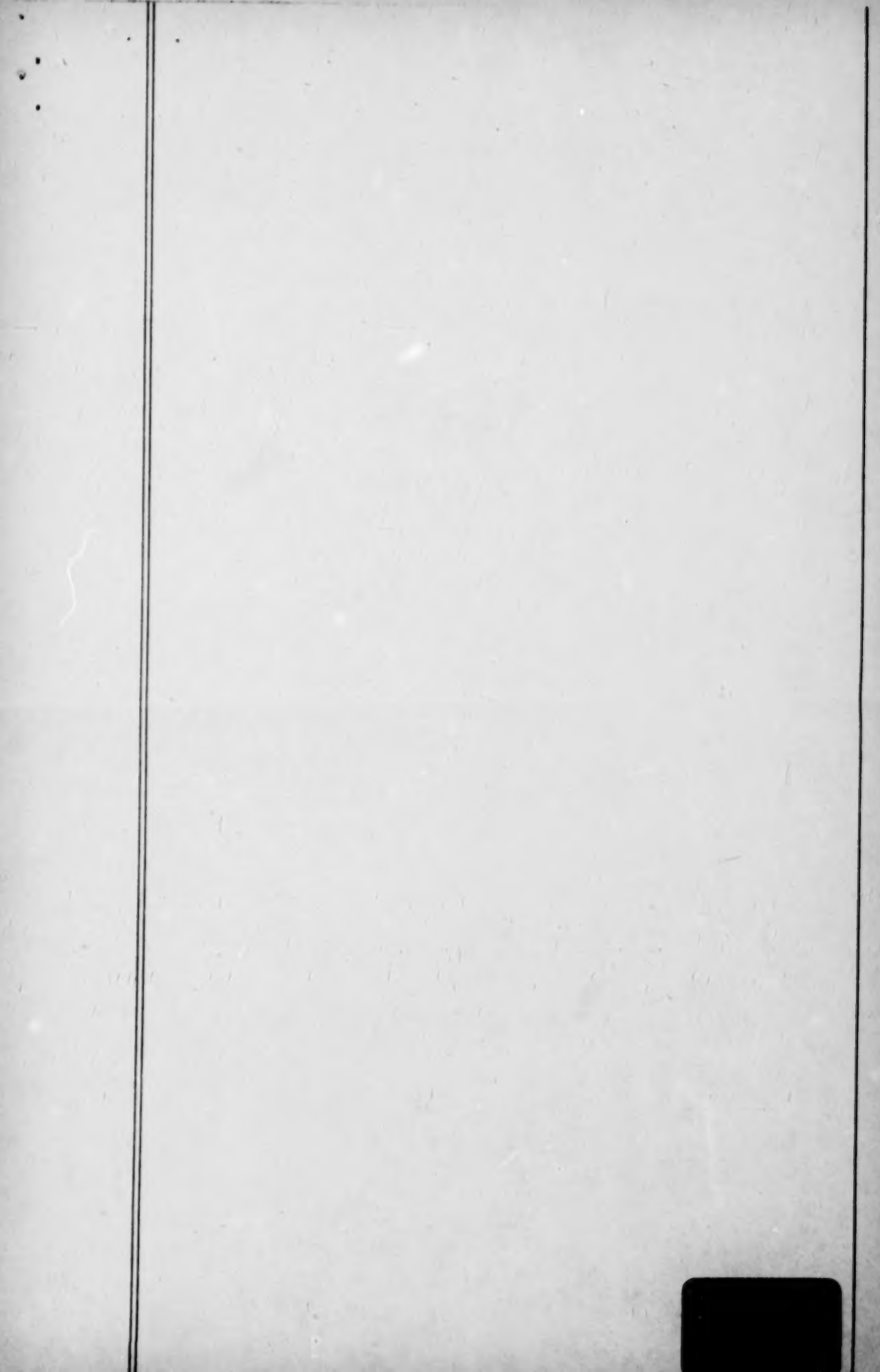
All Courts of Allegheny County, Pennsylvania	June, 1961
The United States District Court for the Western District of Pennsylvania	December 14, 1961
Superior Court of Pennsylvania	1962
Supreme Court of Pennsylvania	November 1, 1962
United States Court of Appeals for the Third Circuit	May 21, 1968 (I argued cases before the Third Circuit prior to this date, because of my status as an Assistant United States Attorney.)
Supreme Court of the United States	October 1, 1972

Legal Experience:

Assistant Law Clerk for Senior District Judge Rabe F. Marsh, Federal Court, Pittsburgh	1962
Administrative Assistant to Senior District Judge Joseph P. Willson, Federal Court, Pittsburgh	1963-1964
Assistant United States Attorney	1964-1968
Schumacher & White private practice	1969 to October 28, 1974
Federal Public Defender for the Western District of Pennsylvania	October 28, 1974 to present

Military Service:

United States Army	September 9, 1954 to August 30, 1956. My primary place of duty during this period of time was as an enlisted man on the Secretary to the General Staff at Seventh Army Headquarters in Germany with a top secret clearance and a rank of Specialist Third Class.
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No. 83-95
IN THE SUPREME COURT OF THE UNITED STATES
1983 TERM

ERNEST S. PATTON, Superintendent,
SCI-Camp Hill, and HARVEY BARTLE, III,
Attorney General of the Commonwealth
of Pennsylvania,

Petitioners

v.

JON E. YOUNT,

Respondent

ORDER OF COURT

AND NOW, to-wit, this _____ day of _____,
1983, upon consideration of the foregoing Motion for Appoint-
ment of Counsel, IT IS ORDERED, ADJUDGED AND DECREED that

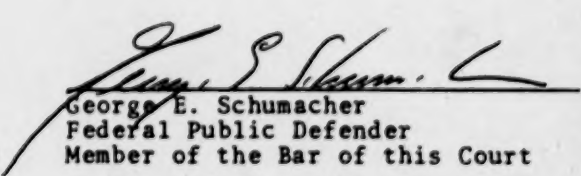
BY THE COURT:

CERTIFICATION OF SERVICE

I hereby certify that on this 28th day of
October, 1983, a copy of this Motion for Appointment of
Counsel was mailed by regular U.S. Mail, postage pre-
paid, to:

F. Cortez Bell, III
Assistant District Attorney
Clearfield County
P.O. Box 887
Clearfield, Pennsylvania 16830

Jon E. Yount
C-8297
State Correctional Institution
P.O. Box 200
Camp Hill, Pennsylvania 17011


George E. Schumacher
Federal Public Defender
Member of the Bar of this Court

No. 83-95

Office - Supreme Court, U.S.

FILED

DEC 16 1983

ALEXANDER L. STEVENS

**In the Supreme Court of the
United States**

October Term, 1983

ERNEST S. PATTON, Superintendent, SCI-CAMP
HILL, and HARVEY BARTLE, III, Attorney Gen-
eral of the Commonwealth of Pennsylvania,
Petitioners

v.

JON E. YOUNT,
Respondent

*On Writ of Certiorari to the United States Court
of Appeals for the Third Circuit*

BRIEF FOR PETITIONERS

F. CORTEZ BELL, III
*Assistant District Attorney
of Clearfield County*

THOMAS F. MORGAN,
*District Attorney of
Clearfield County*
Counsel for Petitioners

P.O. Box 887
Clearfield, PA 16830
(814) 765-9669

Questions Presented for Review

QUESTIONS PRESENTED FOR REVIEW

I. Whether pre-trial publicity of Respondent's re-trial infringed on his ability to select and impanel a fair and impartial jury in light of the provisions of the Sixth Amendment to the Constitution of the United States?

II. Whether a federal court in reviewing a state court conviction by way of a habeas corpus petition may disregard the sworn testimony of jurors to remain impartial and find that the defendant was denied a fair trial on the basis that the jurors were biased by pre-trial publicity?

III. Whether the federal court of appeals improperly applied the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), as to juror prejudice to a state court conviction thereby violating the holding set forth in *Murphy v. Florida*, 421 U.S. 794 (1975)?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Opinions and Judgments Below	1
Statement of Jurisdiction	2
Constitutional Provisions Involved	3
Statement of the Case	4
Summary of Argument	8
Argument:	
I. Whether pre-trial publicity of Respondent's retrial infringed on his ability to select and impanel a fair and impartial jury in light of the provisions of the Sixth Amendment to the Constitution of the United States	11
II. Whether a Federal court in reviewing a State court conviction by way of a habeas corpus petition may disregard the sworn testimony of jurors to remain impartial and find that the Defendant was denied a fair trial on the basis that the jurors were biased by pre-trial publicity	21
III. Whether the Federal Court of Appeals improperly applied the standards set forth in <i>Marshall v. United States</i> , 360 U.S. 310 (1959), as to juror prejudice to a State court conviction thereby violating the holding set forth in <i>Murphy v. Florida</i> , 421 U.S. 794 (1975)	27
Conclusion	38

TABLE OF CITATIONS

CASES:

Beck v. Washington, 369 U.S. 541 (1962)	15, 34
Chandler v. Florida, 449 U.S. 560 (1981)	24
Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969), cert. denied, 397 U.S. 925 (1970)	5
Commonwealth v. Yount, 455 Pa. 303, 314 A.2d 242 (1974)	5, 18, 31
Cupp v. Naughten, 414 U.S. 141 (1973)	24, 25
Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed. 2d 344 (1977)	14, 25
Estes v. Texas, 381 U.S. 532 (1965)	15, 28
Holt v. United States, 218 U.S. 245 (1910)	11
Irvin v. Dowd, 366 U.S. 717 (1961)	9, 11, 13, 15, 19, 25, 27, 28, 31, 32, 33, 34, 36, 37
Marshall v. United States, 360 U.S. 310 (1959)	6, 9, 14, 27, 28, 37
Martin v. Warden, 653 F.2d 799 (3d Cir., 1981), cert. denied, 454 U.S. 1151 (1982)	13, 14, 25
Miranda v. State of Arizona, 384 U.S. 436 (1966)	4
Murphy v. Florida, 421 U.S. 794 (1975)	9, 11, 13, 14, 15, 25, 28, 29, 34, 37
Reynolds v. United States, 98 U.S. 145 (1878)	11
Rideau v. Louisiana, 373 U.S. 723 (1963) ..	11, 14, 19, 28
Sheppard v. Maxwell, 384 U.S. 333 (1966)	14, 15, 19, 28
Smith v. Phillips, 455 U.S. 209 (1982)	19, 23, 24, 25, 29, 33

Spies v. Illinois, 123 U.S. 131 (1887)	11
Sumner v. Mata, 449 U.S. 539 (1981)	19, 23, 24, 29
United States ex rel. Doggett v. Yeager, 472 F.2d 229 (3d Cir., 1973)	28
United States v. Provenzano, 620 F.2d 985 (3d Cir. 1980), cert. denied, 449 U.S. 899 (1980)	13
Yount v. Patton, 710 F.2d 956 (1983), cert. granted, Patton et al. v. Yount, U.S. , 104 S.Ct. 272 (1983)	33, 37

OTHER AUTHORITIES:

28 U.S.C. §1254 (1)	2
28 U.S.C. §2254 (d)	6, 8, 9, 19, 22, 23, 24, 26, 29, 30, 31
Federal Rules of Appellate Procedure, Rule 41 (b) ..	2
Federal Habeas Act of 1867	22
United States Constitution:	
Amendment VI	3
Amendment XIV	3

CITATIONS TO OPINIONS AND JUDGMENTS
BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 710 F.2d 956 (3d Cir., 1983) (J.A. 833a).

The judgment of the United States Court of Appeals for the Third Circuit (J.A. 892a) is not reported.

The opinion of the United States District Court for the Western District of Pennsylvania is reported at 537 F. Supp. 873 (W.D. Pa., 1982) (J.A. 783a).

The order of the United States District Court for the Western District of Pennsylvania (J.A. 809a) is not reported.

The opinion of the Supreme Court of Pennsylvania is reported at 455 Pa. 303, 314 A.2d 242 (1974) (J.A. 277a-293a).

STATEMENT OF JURISDICTION

On April 22, 1982, the United States District Court for the Western District of Pennsylvania denied Respondent's petition for a writ of habeas corpus with prejudice. Respondent appealed this order to the United States Court of Appeals for the Third Circuit which, on May 10, 1983, vacated the judgment of the District Court and directed that the writ of habeas corpus should be granted unless the Commonwealth of Pennsylvania affords Yount with a new trial within a reasonable period of time.

On May 25, 1983, pursuant to motion of the Petitioners herein and Rule 41 (b) of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Third Circuit entered an order staying issuance of the certified judgment to June 30, 1983. The stay was extended upon motion of the Petitioners to July 30, 1983. It was further stated that if during the period of the stay the Court received notification from the Clerk of the Supreme Court that a petition for writ of certiorari had been filed, the stay would continue in effect until final disposition by the Supreme Court.

From the order of the United States Court of Appeals for the Third Circuit granting a new trial, the Petitioners filed a petition for writ of certiorari with this Court on June 29, 1983. Certiorari was granted on October 17, 1983. The jurisdiction of the Supreme Court to review the decision of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which are involved in the instant matter are the Sixth and Fourteenth Amendments to the United States Constitution which provide:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, a senior at DuBois Area High School who resided near Luthersburg, Pennsylvania was found in a wooded area adjoining a red-dog road leading from her school bus stop to her rural home. The autopsy revealed that the cause of death was due to shock, loss of blood and strangulation due to an excess of blood in her lungs. Examination revealed numerous wounds about the girl's head caused by a blunt weapon, three slashes across her throat and cuts of the fingers on her left hand caused by a sharp instrument. When found, the girl's body was not fully clothed, in that one stocking and one shoe had been removed and the stocking tied about her neck.

Respondent, Jon E. Yount, was arrested April 29, 1966, on charges of murder and rape filed to No. 2 May Sessions 1966 in the Court of Quarter Sessions of Clearfield County, Pennsylvania. The case proceeded to trial on September 28, 1966, and on October 7, 1966, the Respondent was pronounced guilty by jury verdict of murder of the first degree and rape. The jury further pronounced sentence as life imprisonment. Following the denial of post-trial motions, Respondent appealed from the judgment of sentence to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania reversed the conviction and ordered a new trial on the basis of *Miranda v. State of Arizona*, 384 U.S. 436 (1966), which had been decided in the period of time between the date of Respondent's arrest and the date of trial. *Commonwealth v.*

Yount, 435 Pa. 276, 256 A.2d 464 (1969). The Commonwealth appealed the ruling of the Pennsylvania Supreme Court with certiorari having been denied at 397 U.S. 925 (1970).

Prior to retrial, hearings were held on or about June 4, 1970, July 29, 1970, and August 17, 1970 with regard to Respondent's pre-trial motions as to change of venue on the basis of inability to select a fair and impartial jury and suppression of confessions and evidence obtained therefrom. The Court by memorandum and order filed September 21, 1970 (J.A. 259a-261a) denied the change of venue request and indicated that it would be bound by the guidelines as to the suppression of evidence as set forth by the Supreme Court of Pennsylvania in its opinion rendered in the instant case found at *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969); *cert. denied*, 397 U.S. 925 (1970).

Jury selection for the retrial commenced on November 4, 1970, with the actual trial beginning on November 17, 1970. A second petition for change of venue was filed on November 13, 1970, during jury selection for the instant case, but was denied by memorandum and order of the Court dated November 14, 1970 (J.A. 262a-266a). On November 20, 1970, the jury returned a verdict of guilty of murder of the first degree. The rape charge was not tried by the Commonwealth at retrial. After denial of post-trial motions (J.A. 276a), Yount was formally sentenced on March 26, 1973. The judgment of sentence was appealed to the Supreme Court of Pennsylvania. That Court by opinion found at *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974) (J.A. 277a-293a) affirmed the judgment of sentence finding that Respondent had not been denied his right to a fair and impartial jury.

Yount, pursuant to 28 U.S.C. §2254, filed a petition for writ of habeas corpus pro se with the United States District Court for the Western District of Pennsylvania on or about January 5, 1981 (J.A. 297a-309a). One issue within the habeas corpus petition dealt with whether he had been able to select a fair and impartial jury. It is that issue which is now before this Court for review. Counsel was appointed to represent Yount and an answer to the petition was filed by the Petitioners herein (J.A. 310a-335a). Following the filing of an amended petition (J.A. 350a-358a) and an amended answer (J.A. 359a-392a), evidentiary hearings were held before the Honorable Robert C. Mitchell, United States Magistrate on November 3, 1981 (J.A. 395a-687a) and December 28, 1981 (J.A. 689a-743a) at which time both parties placed testimony on record with regard to the merits of the petition.

On February 12, 1982, the Honorable Robert C. Mitchell issued his recommendation and report (J.A. 744a-769a) which recommended that a writ of habeas corpus should issue on the basis that the Respondent, herein, could not have received a fair and impartial jury trial within Clearfield County. The Petitioners, herein, filed objections to the Magistrate's report and recommendations (J.A. 770a-777a) on February 19, 1982 on the basis that the Magistrate had improperly applied the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), to the instant case. After oral argument before the Honorable Donald E. Ziegler, United States District Judge, the petition for writ of habeas corpus was denied with prejudice by opinion and order dated April 22, 1983 (J.A. 783a-809a). The District Court expressly found that Yount:

"... has failed to establish that: (1) excessive and biased pre-trial publicity prevented a fair trial;

(2) substantial and undue community bias required a change of venue; and (3) the trial court erred when it denied several challenges for cause. Petitioner's exhausted state claims assail, in part, the factual findings of an experienced trial judge and an appellate jurist of renown. We find an absence of convincing evidence to contradict their finding and we further hold, based on an independent review of the record, that petitioner has failed to establish that this state court judgment is violative of the Due Process Clause of the Fourteenth Amendment." (J.A. 807a-808a)

On May 10, 1983, following the filing of an appeal (J.A. 892a) and the presentation of oral argument, the United States Court of Appeals for the Third Circuit vacated the judgment of the District Court and held that a writ of habeas corpus should issue unless the Commonwealth affords Yount a new trial within a reasonable period of time (J.A. 868a); the reason for such being the Court of Appeals' feeling that Yount had established that pre-trial publicity had caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County (J.A. 867a-868a). The Court of Appeals stated:

"... We must view the jurors' assurances of impartiality in light of the pre-trial publicity, the difficulty of voir dire, and the testimony of the jurors selected. We conclude that despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court." (J.A. 867a)

Petitioners filed a petition for writ of certiorari on June 29, 1983. Certiorari was granted on October 17, 1983.

SUMMARY OF ARGUMENT

I. The pre-trial publicity surrounding the Yount trial did not infringe on his ability to select and impanel a fair and impartial jury. The standards as to juror impartiality clearly establish that mere exposure of a person to publicity about a case is not sufficient to establish that the person may not sit as a juror. Further the fact that a person may have formed an opinion as to the case does not exclude him from sitting as a juror if it can be shown that he will set aside his opinion and decide the case solely on the basis of the evidence presented at trial. Yount has failed to establish that the pre-trial publicity or influence of the press surrounding his trial was such that it "utterly corrupted" the trial. Each Court, which has reviewed the case, has established by independent review that the publicity was accurate, factual in nature and without editorial comment. It does not rise to that level or magnitude necessary to establish that the trial proceedings were "utterly corrupted."

II. Each time a Federal court accepts a habeas corpus petition from a person held in State custody, friction results within our two-court system. In order to eliminate much of this friction, 28 U.S.C. §2254 (d) provides that a determination made by a State court shall be presumed to be correct. Although it is clear that a Federal court may review a State court conviction, extreme care and caution must be used by the Federal court. A State court conviction may be overturned only in those instances where there has been a clear and evident violation of some right guaranteed to the defendant by the Fourteenth Amendment. When reviewing an assertion as to pre-trial publicity, the

standard is clear that the defendant must establish that the pre-trial publicity was so extreme as to cause actual prejudice or that such press coverage has "utterly corrupted" the trial.

III. This Court's holding in *Murphy v. Florida*, 421 U.S. 794 (1975), makes clear that the standards and methods of review applicable to the Federal courts through *Marshall v. United States*, 360 U.S. 310 (1959), shall not be used to review State court proceedings. A petitioner, who is seeking to challenge a State court conviction by way of a habeas corpus petition, has the burden of establishing that a constitutional provision has been violated. In specific, Yount in the instant proceeding, must establish that the pre-trial publicity surrounding his trial was so extreme that it caused actual prejudice to a degree that he was unable to select and impanel a fair and impartial jury. The determination by the trial court and the Supreme Court of Pennsylvania that actual prejudice could not be found must be accepted as correct pursuant to 28 U.S.C. §2254 (d). The Court of Appeals for the Third Circuit clearly erred in finding that the State court's determination was not supported by the record.

An independent review of the record of Yount's case clearly reveals that actual prejudice did not exist nor may it be imputed to those jurors who were ultimately selected to hear the case. The Yount case is clearly distinguishable from that presented to this Court in *Irvin v. Dowd*, 366 U.S. 717 (1961). Nine of the jurors who sat in Yount's case were selected without challenges of any form. The remaining three jurors, although challenged for cause, indicated that they either had no fixed opinion or that they could enter the jury box with an open mind. Voir dire examination is not meant to be reduced to a statistical gen-

eralization of community knowledge of a case but rather should be an individual safeguard of juror impartiality. The Court of Appeals for the Third Circuit erred in its finding that actual prejudice existed to such a degree rendering a fair trial impossible. The jury impaneled to hear the case clearly was free from any prejudice and was able to render its verdict in a fair and impartial manner.

ARGUMENT

I. WHETHER PRE-TRIAL PUBLICITY OF RESPONDENT'S RETRIAL INFRINGED ON HIS ABILITY TO SELECT AND IMPANEL A FAIR AND IMPARTIAL JURY IN LIGHT OF THE PROVISIONS OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A. Introduction

The Sixth Amendment to the Constitution of the United States clearly provides that an accused in a criminal proceeding is entitled as a matter of right to a trial, "... by an impartial jury of the State and district wherein the crime shall have been committed. . . ." It is equally clear that this right is fully protected and fully applicable in State court proceedings as a result of the operation of the due process provisions of the Fourteenth Amendment.

Throughout the course of history, as both the speed and methods of public communication have increased, the courts have consistently had to resolve the inevitable conflict which has arisen between the publicity generated by a case and the defendant's right to an impartial jury. This Court on innumerable instances has dealt with this particular question. See: *Reynolds v. United States*, 98 U.S. 145 (1878); *Spies v. Illinois*, 123 U.S. 131 (1887); *Holt v. United States*, 218 U.S. 245 (1910); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Murphy v. Florida*, 421 U.S. 794 (1975).

The instant case presents to the Court once again the question as to whether an accused was denied his right to select and impanel an impartial jury due to the effect of pre-trial publicity. In specific, Yount is asserting that his right to be tried before a fair and impartial jury was impaired due to the exposure of the Clearfield County public to publicity which surrounded his first trial, the subsequent appellate proceedings, as well as those matters leading up to the commencement of the second trial. Yount bolsters this assertion by relying on the voir dire transcript from the second trial and its alleged indication that numerous members of the venire had an opinion as to his guilt or innocence or in the least that various members of the panel of jurors admitted that they had heard of and/or discussed the case with others or that they held an opinion as to guilt or innocence which they believed could be set aside when rendering a verdict.

Granted, the case did receive substantial publicity within the Clearfield County area. The Petitioners would submit, however, that the publicity was not such that the members of the jury were prejudiced to Yount's detriment. Likewise, the testimony at voir dire, although evidencing that many persons had heard of or discussed the case, does not evidence that a fair and impartial jury was not selected in Yount's case.

B. Voir Dire Standard

The standard to be applied during voir dire in cases involving pre-trial publicity in order to assure the selection of a fair and impartial jury has been well established by this Court. The law is well settled that simple exposure of

a juror to pre-trial publicity will not automatically taint a juror such that he must be excluded from sitting on a case. "Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based on the evidence presented at trial." *United States v. Provenzano*, 620 F.2d 985, 995 (3d. Cir. 1980), *cert. denied*, 449 U.S. 899 (1980). See also: *Irvin v. Dowd*, 366 U.S. 717, 723 (1961); *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Martin v. Warden*, 653 F.2d 799, 804 (3d Cir., 1981), *cert. denied*, 454 U.S. 1151 (1982). "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). "At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" *Murphy v. Florida*, 421 U.S. 794, 800 (1975) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)); see also: *United States v. Provenzano*, 620 F.2d 985, 995 (3d. Cir., 1980), *cert. denied*, 449 U.S. 899 (1980); *Martin v. Warden*, 653 F.2d 799, 804 (3d Cir., 1981), *cert. denied*, 454 U.S. 1151 (1982).

A further factor to be considered in the application of the above standards is that the instant matter before this Court involves Federal review of a State court proceeding by way of a habeas corpus petition. When reviewing an assertion as to pre-trial publicity or change of venue in a habeas corpus proceeding from a State court conviction,

the Federal court's review narrows considerably. A defendant seeking review of his Federal conviction need only show that his jury has been exposed to publicity with a high potential for prejudice in order to allow a Federal court to presume that his jury has been prejudiced. See: *Marshall v. United States*, 360 U.S. 310, 312-313 (1959). "A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial. (Emphasis added.) *Murphy v. Florida*, 421 U.S. at 798, 95 S.Ct. at 2035. See also: *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed. 2d. 344 (1977)." *Martin v. Warden*, 653 F.2d 799, 805 (3d Cir., 1981), *cert. denied*, 454 U.S. 1151 (1982). This argument deals only with the issue as to whether the pre-trial publicity "utterly corrupted" the trial within the State court. The question as to whether actual prejudice has been shown is dealt with in Argument III of this brief.

C. Utterly Corrupted Trial Claim

This Court on several occasions has found instances where publicity surrounding a trial has "utterly corrupted" it. In each instance, the inherently prejudicial reporting or influence of the press is patently visible. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the defendant's confession was broadcast several times on television within the community from which the jury was to be selected. This Court found prejudice to the defendant without even taking the step of a review of the transcript of voir dire of the individual members of the jury. In *Sheppard v. Maxwell*,

384 U.S. 333 (1966), the writ of habeas corpus was issued in an instance where there was extremely inflammatory publicity surrounding the trial as well as where the press totally disrupted the court proceeding. In *Estes v. Texas*, 381 U.S. 532 (1965), the press once again physically disrupted the course of the trial of the case to the extent that it pervaded the proceedings. In *Irvin v. Dowd*, 366 U.S. 717 (1961), there was massive inflammatory publicity prior to trial including information as to the defendant's alleged confessions to some twenty-four burglaries and six murders; his previous record which included convictions for arson and burglary; his identification at a police lineup as well as his offer to enter a plea of guilty for a particular sentence. Further, the newspapers on the day prior to trial carried stories that he had orally admitted to the murder of the victim in the case while at the same time admitting to five other murders.

The pre-trial publicity presented to this Court in the instant case does not even approach the inflammatory nature or magnitude of that found in *Rideau*, *Sheppard*, *Estes*, and *Irvin*. Additionally, there is no evidence of any official involvement in its preparation or dissemination. The publicity involved in the Yount case was spread out over the space of four years. As the Court of Appeals' opinion indicates: "The publicity was understandably most extensive and most potentially prejudicial before and during petitioner's (Yount's) first trial, which was four years before his second trial." (J.A. 861a). The passage of time often tends to negate the effects of pre-trial publicity and decreases the possibility that a juror may be prejudiced as a result thereof. See: *Beck v. Washington*, 369 U.S. 541, 556 (1962); *Murphy v. Florida*, 421 U.S. 794, 802 (1975). The Court of Appeals agreed with the magis-

trate's finding that the second trial "was surrounded with publicity, but not to the same degree" as could be found with regard to the first trial (J.A. 861a, footnote 21). Likewise, the news articles which are involved in the case, even those surrounding the date of the second trial, were found by the Court of Appeals to be accurate, factual in nature and without editorial comment (J.A. 860a). The District Court indicated that the newspaper reports concerning the second trial "were not inflammatory so as to preclude a fair trial. . . . The news reports concerning the exhaustion of various jury panels and the progress of voir dire are to the same effect" (J.A. 789a-790a). The District Court further stated: "The pre-trial publicity in Clearfield County prior to trial was found to be balanced and accurate, and we cannot conclude from our independent review of the record that there is convincing evidence to the contrary" (J.A. 789a).

The number of the news articles published with regard to the case clearly does not rise to the level necessary to show that publicity "utterly corrupted" the trial. The Court of Appeals notes that the record indicates sixty-six front page articles were published covering the appeal and second trial (J.A. 861a, footnote 21). In actuality, there were only fifteen news articles within the record on this petition covering the four-year period of time from the conclusion of the first trial to the commencement of the second trial. The remainder of the articles referred to by the Court of Appeals occurred after commencement of the selection of jurors for the second trial. It is important to note that as jurors were selected they were sequestered and thus those persons sitting on Yount's jury were not exposed to the total number of articles as the Court of Appeals' opinion implies.

The extent and nature of the publicity in the present case clearly is not of that type which has been found in the past to have "utterly corrupted" a trial. Each of the courts below, which have independently reviewed the record of the instant case, have found that Yount has failed in establishing that the press coverage surrounding his case "utterly corrupted" the trial.

The trial court filed two memoranda and one opinion dealing with its findings as to claims of prejudicial pre-trial publicity influencing the proceedings of the trial. The first memorandum filed September 21, 1970 (J.A. 259a) prior to the commencement of the retrial stated:

"... the evidence was limited to the facts that without editorial comment of any kinds the newspapers in the County reported the decision of the Supreme Court of Pennsylvania; but it is to be noted that they not only referred to the descending [sic] opinion and quoted it, but also to the majority opinion and quoted it. We do not believe that the mandates of the cases extend so far as to say that the news media cannot publicize, without editorial comment, the decisions of our Courts. It is our belief that this is a necessary and salutary privilege and right of the news media; and that in this instance the reporting did not extend itself beyond that privilege and right." (J.A. 260a)

In the second memorandum, filed November 14, 1970 (J.A. 262a), during the selection of the jury, the trial court stated:

"The Court would also note that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there has been little, if any, talk in public concerning the trial from that time to the

time when it was announced that a trial date had been fixed.

* * *

Nor do we find any unfair inferences or prejudicial effects as to or against the defendant resulting in any of the newspaper items which have been the subject of the affidavit filed in this regard on November 13, 1970." (J.A. 264a-265a)

In its final discussion of the publicity issue, the trial court in its opinion by which post-trial motions were denied dated January 15, 1973 (J.A. 267a) indicated:

"The first of the trials occurred in 1966, and as pointed out herein, the second one occurred in 1970. As the record will indicate there was practically no publicity given to this matter through the news media in the meanwhile except to report that a new trial had been granted by the Supreme Court. It is to be noted also that throughout the second trial there was practically no public interest shown in the trial; one thing to be noted is that on some days there being practically no person present even to listen to it." (J.A. 268a)

Following sentencing, the publicity issue was presented to the Supreme Court of Pennsylvania on appeal. Justice Roberts writing for the unanimous court in affirming the conviction stated: "These findings (no excessive pre-trial publicity), fully supported by the record, do not sustain appellant's claim, and the court properly denied appellant's motion for change of venue predicated on this theory." *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974) (J.A. 284a). The courts of the Commonwealth of Pennsylvania have therefore reviewed the question as to pre-trial publicity and found that such did not

corrupt the trial. Such State court findings must be presumed to be correct by any Federal court which reviews the matter. 28 U.S.C. §2254 (d); *Smith v. Phillips*, 455 U.S. 209, 218 (1982); *Sumner v. Mata*, 449 U.S. 539, 551 (1981).

The United States District Court for the Western District of Pennsylvania was the initial Federal court which was faced with a review of the State court findings. Although the District Court did note the presumption of validity in accord with 28 U.S.C. §2254 (d), the opinion of the Court makes clear that an independent evaluation of the record was conducted. District Judge Ziegler in expressing his findings noted:

"The pre-trial publicity in Clearfield County prior to trial was found to be balanced and accurate, and we cannot conclude from our independent review of the record that there is convincing evidence to the contrary.

* * *

Most importantly there is no evidence of record of official misconduct either in dismissing the rape charge prior to trial, or in influencing the publicity given the case as in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963) or *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966). Nor does the pre-trial publicity reveal the viciousness evidenced in *Rideau*, *Sheppard*, or *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961). Finally, the publicity in quantity does not approach the mischief detected in *Sheppard*.

* * *

We find that petitioner has failed in his burden of establishing publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County, or that the coverage utterly corrupted the judicial process." (Opinion of the Honorable Donald E. Ziegler dated April 22, 1982, pp. 5-6, J.A. 789a-790a).

Even the United States Court of Appeals for the Third Circuit in reviewing the District Court decision found that the pre-trial publicity was not such that the trial was corrupted. Circuit Judge Hunter in the opinion of the Court stated: "The publicity in this case, though it had a high potential for prejudice, did not utterly corrupt the trial atmosphere in that fashion." (J.A. 858a). Circuit Judge Garth, in his concurring opinion, noted: "In this case, no juror was exposed to adverse publicity during trial, and the record reflecting the publicity preceeding Yount's second trial, in my opinion, was not so inflammatory as to give rise to a presumption of partiality." (J.A. 882a).

Thus, every court which has reviewed the pre-trial publicity surrounding the Yount case has found that the nature and quantity of such publicity was *not* such that the trial proceedings were "utterly corrupted". Yount has failed to carry his burden of establishing, for purpose of Federal court review, that the pre-trial publicity infringed on his ability to select and impanel a fair and impartial jury.

II. WHETHER A FEDERAL COURT IN REVIEWING A STATE COURT CONVICTION BY WAY OF A HABEAS CORPUS PETITION MAY DISREGARD THE SWORN TESTIMONY OF JURORS TO REMAIN IMPARTIAL AND FIND THAT THE DEFENDANT WAS DENIED A FAIR TRIAL ON THE BASIS THAT THE JURORS WERE BIASED BY PRE-TRIAL PUBLICITY

A. Introduction

Throughout the history of our nation, the dual Federal and State court systems have consistently strived to interpret and carry out the ideals and provisions of the United States Constitution. As is bound to happen when two independent bodies consider the same law, a variance of opinions often occurs as to the interpretation to be accorded a particular provision, the end result being that the Federal court system and the State court system are brought into conflict with one another. Numerous attempts have been made to remedy and avoid these areas of conflict while still allowing the two court systems the flexibility and discretion which they each deserve. Such attempts to avoid conflict have taken the form of both statutory law and the judicially-made doctrine of abstention.

In certain areas of the law, conflict between the Federal and State court systems may simply not be avoided. One such area is that raised by the instant case of habeas corpus review. Each time a Federal court accepts a habeas corpus petition from a person held in State custody, the two court system is placed in the delicate position of attempting to maintain the balance between the two systems.

B. Presumption of Correctness of State Court Determination

It was apparently in an effort to control and limit the friction between the State and Federal courts that Congress in 1966 enacted subsection (d) of 28 U.S.C. §2254¹ as an amendment to the original Federal Habeas Act of 1867. As a result of the amendment, the findings of a State court are presumed to be correct unless the Federal court when

¹ 28 U.S.C. §2254(d) provides:

“§2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS

....

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

reviewing those findings can articulate that one of seven specific conditions exist. If none of the seven conditions exist, then the Federal court may only rebut the presumption of correctness of the State court findings if it can be established that the State court determination is not fairly supported by the record. The burden of establishing that such is the case falls upon the habeas petitioner to establish by convincing evidence that the State court determination was in error. *Sumner v. Mata*, 449 U.S. 539, 550-551 (1981); *Smith v. Phillips*, 455 U.S. 209, 218 (1982).

In order to assure that the congressional intent in establishing 28 U.S.C. §2254 (d) is not frustrated as well as

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

to assure ease of review by courts of appeals and this Court, the opinion of *Sumner* established the requirement "that a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly by the record.' " *Sumner v. Mata*, 449 U.S. 539, 551 (1981). Thus, even before a Federal court may reach the point of determining an issue as to the effect of pre-trial publicity on jurors and their assurance of impartiality, a specific finding must first be made which allows the Federal court to proceed beyond the presumption of correctness of the State court determination. Only if such a finding can be made, may the Federal court proceed to its own determination as to the issue involved.

C. Pre-Trial Publicity Test

Assuming that the Federal court can satisfy the requirements of 28 U.S.C. §2254(d), its determination of the issues raised in the habeas corpus petition in the instant case is still limited to some extent. "A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provisions of the United States Constitution." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *Chandler v. Florida*, 449 U.S. 560, 570 (1981); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). "Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it vio-

lated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973), quoted in *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

In specific as to the pre-trial publicity issue, the reviewing Federal court is even more limited. As has been set forth previously within this brief: "A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial. (Emphasis added) *Murphy v. Florida*, 421 U.S. at 798, 95 S.Ct. at 2035. See also: *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed. 2d. 344 (1977)." *Martin v. Warden*, 653 F.2d 799, 805 (3d. Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). Thus, the Federal court's review as to pre-trial publicity issues is narrowed considerably.

As has previously been argued within this brief, the pre-trial publicity with regard to the Yount case was *not* such that it "utterly corrupted" the trial. Every court which has reviewed the case has reached the same conclusion in that regard. Therefore, the only manner in which Yount may prevail is to establish that the pre-trial publicity was so extreme as to have resulted in actual prejudice to the trial of his case before Clearfield County jurors. The mere fact that a potential juror has heard of the case or even that he has formed an opinion as to guilt or innocence is not sufficient to remove him from the case. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). The showing of partiality on the part of a juror or the panel as a

whole is upon the petitioner. Only upon such a showing may Yount prevail on the pre-trial publicity partiality issue.

It is, therefore, apparent that a Federal court in reviewing a State court conviction within a habeas corpus proceeding may find that, despite the assurances of the jurors to the contrary, the defendant was denied a fair trial by an impartial jury. Such a decision must, however, take place only if certain very strict conditions and circumstances are adhered to by the Federal court. The court must first demonstrate that the full requirements of 28 U.S.C. §2254 (d) have been considered and that the presumption of correctness of the State court determination has been properly rebutted. The Court must then find that the habeas petitioner has established that pre-trial publicity with regard to his case was so extreme as to cause actual prejudice such that a fair trial was impossible.

III. WHETHER THE FEDERAL COURT OF APPEALS IMPROPERLY APPLIED THE STANDARDS SET FORTH IN *MARSHALL V. UNITED STATES*, 360 U.S. 310 (1959), AS TO JUROR PREJUDICE TO A STATE COURT CONVICTION THEREBY VIOLATING THE HOLDING SET FORTH IN *MURPHY V. FLORIDA*, 421 U.S. 794 (1975)

A. Introduction

This Court in *Marshall v. United States*, 360 U.S. 310 (1959), sets forth a holding which allowed the Federal courts to overturn the verdict of a jury, when it appeared to the Court that the publicity before or during a case was such that the jury could be prejudiced toward the defendant. This Court in *Marshall*, found that the members of the jury during the course of trial had been exposed to information which had previously been ruled upon by the trial court to be non-admissible as being prejudicial to the defendant. The Court found that in the exercise of its supervisory power over the Federal courts, a new trial was mandated. See: *Marshall v. United States*, 360 U.S. 310, 312-313 (1959).

Following the holding in *Marshall*, this Court had occasion to apply the same standards to a State court proceeding in *Irvin v. Dowd*, 366 U.S. 717 (1961). That case, which deals with the determination of prejudice as a result of pre-trial publicity, involved circumstances where the community prior to trial was bombarded with inflammatory publicity concerning not only the charges to be tried but also numerous other allegations of criminal involvement. This Court, after reviewing the standards to be applied to jurors who had been exposed to pre-trial publicity,

proceeded further and found that regardless, as to the assertions of impartiality by the jurors, the community as a whole was prejudiced toward the defendant. This Court found that the statements of impartiality by the jurors should be given little weight considering the prejudice found to exist within the community. *Irvin v. Dowd*, 366 U.S. 717, 727-728 (1961).

Following *Irvin*, the Court had numerous other chances to consider the impact of publicity on trial proceedings. Some of the most notable decisions being: *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In each instance, a State court conviction was overturned on the basis that publicity had in some manner influenced the trial. Finally in 1975, a case reached this Court, *Murphy v. Florida*, 421 U.S. 794 (1975), concerning the issue as to whether the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), were equally applicable to State court proceedings. In the interim, the Federal courts of appeals had issued conflicting decisions as to the applicability of *Marshall*. See: *United States ex rel. Doggett v. Yeager*, 472 F.2d 229 (3d Cir., 1973).

In *Murphy v. Florida*, 421 U.S. 794, 798 (1975), this Court stated:

"In the face of so clear a statement, it cannot be maintained that *Marshall* was a constitutional ruling now applicable, though the Fourteenth Amendment, to the States. . . . We cannot agree that *Marshall* has any application beyond the federal courts."

In *Murphy*, this Court found that the pre-trial publicity was not such that it "utterly corrupted" the trial nor was it so

extensive that actual prejudice could be found to exist. The instant case presents to this Court for review issues the same as those considered in *Murphy*. As has been demonstrated previously within this brief, the pre-trial publicity surrounding the Yount trial was not such that the trial was "utterly corrupted." Each court which has reviewed that question has reached a similar conclusion.

The instant argument, therefore, deals only with Yount's claim that pre-trial publicity had resulted in actual prejudice to the extent that a fair trial by an impartial jury could not be obtained. It is the position of the Petitioners that the United States Court of Appeals for the Third Circuit committed error in finding that actual prejudice existed in Yount's case.

B. Presumption of Correctness of State Court Determination

As has been indicated earlier in this brief, a State court determination of an issue must be presumed to be correct by a Federal court seeking to review a habeas corpus petition. Only upon a specific showing that one of seven factors is present or that the State court finding is not adequately supported by the record may the presumption accorded to the State court finding be rebutted. The burden is placed upon the habeas petitioner to establish by convincing evidence that the State court determination is improper. 28 U.S.C. §2254 (d) ; *Sumner v. Mata*, 449 U.S. 539, 550-551 (1981) ; *Smith v. Phillips*, 455 U.S. 209, 218 (1982). Further, the Federal court must specifically articulate its findings indicating its reasons why the presumption established by 28 U.S.C. §2254 (d) is not being followed.

In the present case before this Court, it is the position of the Petitioners that Yount has failed to establish by convincing evidence that the State court determination is improper. The United States Court of Appeals for the Third Circuit committed error in finding that the presumption of validity has been rebutted. The only reference indicating that the Court of Appeals even considered the effect of 28 U.S.C. §2254 (d) is found in footnotes 21 and 22 of the Court of Appeals Opinion (J.A. 861a-862a).

The text of footnote 21 clearly reveals the error made by the Court of Appeals (J.A. 861a). That reference by the Court of Appeals indicates that the trial court erred in its finding that between trial and retrial there was very little publicity or media attention devoted to the case. The trial court could not have been more correct. From the time of the conclusion of the first trial to the commencement of the second trial with voir dire on November 4, 1970, the record only evidences fifteen news articles concerning Yount's case. What makes the trial court's determination even more credible is that those articles were spread out over a period of four years. The Court of Appeals' indication that there were sixty-six front-page articles fails to take into consideration that once the jurors were chosen they were sequestered from such news coverage. Further, the figure reached by the Federal Court of Appeals does not even cover the same period as the trial court and thus no comparison may be made.

Nor does the voir dire record support the finding of the Court of Appeals that the trial court erred in indicating that there had been very little discussion of the second trial in public (J.A. 862a). Although, the voir dire does indicate some discussion did take place, it is clear that the majority of the members of the panel were not asked when

they had heard the discussions take place. The Court of Appeals improperly makes the assumption that such discussions occurred just prior to the second trial as opposed to four years prior thereto at the time of the first trial.

The trial court within its memorandums of September 21, 1970 (J.A. 260a), November 14, 1970 (J.A. 264a-265a) and opinion of January 15, 1973 (J.A. 268a) makes clear that there was no indication whatsoever that pre-trial publicity had caused actual prejudice to Yount such that a fair and impartial jury could not be selected. The Supreme Court of Pennsylvania concurred with the trial court's determination by stating: "Neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of prejudice or a 'pattern of deep and bitter prejudice' shown . . . throughout the community' which would require a change of venue. *Irvin v. Dowd*, 366 U.S. 717, 725, 728, 81 S.Ct. 1639, 1644, 1645, 6 L.Ed. 2d 751 (1961)" *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974) (J.A. 284a-285a). Such State court determinations must be found to be correct pursuant to 28 U.S.C. §2254(d). Yount has not produced sufficient evidence to rebut the presumption of the correctness of the State court findings.

Even the District court found that the State court determination was correct. Judge Ziegler stated:

" . . . we find nothing in the pre-trial publicity, or the responses of the citizens who were excused for cause, or the number of such recusals, or the attitudes of the jurors who were seated, that leads to the conclusion that the venire was presumptively prejudiced so as to require a change of venue. . . . Petitioner has failed to establish that community bias prevented the

selection of an impartial jury in Clearfield County in contravention of the Fourteenth Amendment." (Opinion of the Honorable Donald E. Ziegler dated April 22, 1982, pp. 16-17, J.A. 805a).

Judge Ziegler at an earlier point in his opinion p. 6 (J.A. 790a) concluded, "We find that petitioner has failed in his burden of establishing publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County. . . ."

C. Actual Prejudice Claim

It is Yount's contention that pre-trial publicity was so extensive that actual prejudice resulted in the community as a whole such that a fair trial by an impartial jury was impossible. The United States Court of Appeals for the Third Circuit in granting the writ of habeas corpus agreed with Yount. That Court clearly reached its conclusion as a result of the application of the holding of this Court in *Irvin v. Dowd*, 366 U.S. 717 (1961), to the present case. The Petitioners would assert that the Court of Appeals erred in this regard. The *Irvin v. Dowd* decision is wholly inapplicable to the Yount case. The Court of Appeals improperly applied the *Irvin* test as to impartiality to the Yount trial.

At the outset, one must not lose sight of the whole purpose of voir dire. Voir dire examination exists for the purpose of allowing counsel and the Court to establish and determine whether one or more jurors has a preconceived opinion as to the guilt or innocence of the defendant. Further, it allows the opportunity for it to be established whether that particular juror may set aside his or her opinion and render a verdict based solely on the evidence pre-

sented at trial. At no time has an assertion been made by Yount that the voir dire examination conducted in his case was not adequate or extensive enough so as to allow a full inquiry into the jurors' feelings. The Court of Appeals concedes that the trial court did extend great leniency to the Petitioner (Yount) in his questioning of the veniremen (J.A. 863a, footnote 23).

Voir dire examination, thus, when properly conducted, acts as a primary safeguard of the question of juror impartiality. Effective use of challenges for cause and peremptory challenges act as an additional safeguard of impartiality of those selected to serve on the jury panel. The concept of due process requires not that members of a jury must be totally free of knowledge or opinions as to a case, but rather that they must be capable and willing to set aside their opinions and render a verdict based solely upon the evidence established at trial. The fact that any one juror may have a preconceived opinion as to guilt or innocence does not preclude him or her from serving on the jury. Such is not sufficient to rebut the presumption of that juror's impartiality. *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Irvin v. Dowd*, 366 U.S. 717, 722-723 (1961). Likewise, "... given a voir dire which is concededly adequate and which functions to achieve its designed purpose, a venue change is not constitutionally required simply because many of the persons who will *not* serve on the defendant's jury may harbor prejudices as to the defendant's guilt." Concurring opinion of Judge Garth in *Yount v. Patton*, 710 F.2d 956, 980 (1983), *cert. granted*, *Patton et al. v. Yount*, U.S. , 104 S.Ct. 272 (1983) (J.A. 887a).

In its application of the above principles to the Yount case, the Court of Appeals becomes too concerned with a

statistical analysis leading to generalization of the voir dire as a whole rather than dealing with the voir dire as a specific individual process designed to select those who are impartial to the case. Such arises from the Court attempting to apply the *Irvin v. Dowd*, 366 U.S. 717 (1961), test to the instant case as well as reaching for the prejudice found in *Marshall v. United States*, 360 U.S. 310 (1959). Yet even the per curiam opinion in *Marshall* discourages the use of generalizations as opposed to specific facts. "Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall v. United States*, 360 U.S. 310, 312 (1959).

The Yount case is significantly different from *Irvin v. Dowd*, 366 U.S. 717 (1961), and is much more similar to *Murphy v. Florida*, 421 U.S. 794 (1975). In *Irvin*, eight out of twelve jurors indicated that they had fixed opinions as to the guilt of the defendant. In Yount, six out of twelve jurors testified that they had no preconceived opinion as to Yount's guilt. Of the remaining six jurors only one was challenged for cause (Hrin).

It is important to note that Yount did *not* challenge, in any form, nine of the jurors who decided his case (Hoover, Clapsaddle, Yorke, Waple, Karetski, Hummell, Parks, Undercoffer and Murphy). Such failure on his part to raise any challenge, either for cause or peremptorily, clearly leads to a strong conclusion that he was fully satisfied with them sitting on the jury. "The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt." *Beck v. Washington*, 369 U.S. 541, 557-558 (1962). Yount must not be allowed now, some thirteen years later, to change his mind and argue that the jurors so selected were

not impartial to the case. If Yount, at the time of trial, had felt that either the individual jurors or the community as a whole were so prejudiced against him, surely he would have challenged for cause at least one if not all of these nine jurors. Further, in Yount, only three of the twelve jurors (Hrin, Kurtz and Harchak) were challenged for cause. Two of these three (Kurtz and Harchak) indicated that they had no fixed opinion. The third (Hrin), although indicating that he did have an opinion, stated that he would enter the jury box with an open mind. It should be noted that at the time the challenge for cause was made and denied as to juror Hrin, Yount still had a majority of his peremptory challenges remaining. Once again, if Yount felt so strongly that Hrin was prejudiced toward him, surely a peremptory challenge would have been made. None was. Obviously, any review as to the voir dire testimony of a juror must involve a complete review of the voir dire as a whole. When considered in that light, the voir dire of Hrin clearly indicates his position that he could enter the jury box with an open mind.

"Q. Mr. Hrin, I have to come back to the question that—can you put aside whatever opinion you had—solid, unsolid or however you want to describe it—can you set it aside before you go into the jury box or would you need some evidence before you could change your mind? Now think about it for a second.

A. I have to.

Q. Give me yes or no?

A. I think I could enter it with a very open mind, I think I could very easily. To say this is a requirement for some of the things you have to do every day." Voir Dire of James Hrin pp. 445-446, (J.A. 889a).

In *Irvin*, the voir dire consumed a period of four weeks during which time four hundred and fifteen people came before the court on voir dire. In Yount, the voir dire took place over the course of nine days and only one hundred sixty-seven people were brought before the Court on voir dire. Such clearly does not rise to the level of difficulty which apparently was experienced in *Irvin* in selecting a jury. In *Irvin*, the magnitude and nature of the publicity to which the community was exposed clearly was patently inflammatory. The public was exposed to extensive publicity concerning Irvin's confessions to not only the murder for which he was being tried but also to some twenty-four burglaries and five other murders. His prior criminal record was discussed as well as his identification at a police lineup and his offer to enter a plea of guilt for a particular sentence. The day prior to trial, his confession to the crime for which he was to be tried was reported in the news media. Yount presents an altogether different level of publicity. Each court which has reviewed the publicity surrounding the Yount case has found it to be accurate, factual in nature and published without editorial comment. Although there was publicity surrounding Yount's second trial, it did not rise to the level surrounding the first trial. In neither instance, did the publicity surrounding the Yount case rise to the levels or magnitude of that found in *Irvin*. The Yount case is clearly distinguishable from *Irvin*.

The Court of Appeals in Yount through its application of the *Irvin* test becomes involved in a statistical generalization of the whole voir dire and publicity issue. The Court of Appeals' opinion if followed would clearly lead to the demise of the voir dire system. As Judge Garth indicates in his concurring opinion:

"To my mind, this reliance on statistics, without regard to the scope of the *voir dire* or the absence of challenges for cause, elevates to talismanic significance the percentage of veniremen *as a whole* with opinions about a defendant's guilt. I do not believe *Irvin v. Dowd* was ever intended to be read in this fashion. If the scope of *voir dire* is ample—as it concededly is in this case—the fact that a large percentage of persons who are not on the jury have prejudices should carry little weight." Concurring opinion of Judge Garth in *Yount v. Patton*, 710 F.2d 956, 980 (1983), *cert. granted*, *Patton et al. v. Yount*, U.S. , 104 S.Ct. 272 (1973) (J.A. 886a-887a).

Must a trial judge, following completion of *voir dire* in a case, call a recess so that he might calculate the percentage of those persons who had indicated opinions as to the case? Even though none of those persons have been seated on the jury, must he grant a mistrial on the basis that a certain magical percentage has been reached such that bias may be imputed? To do so would mean the end of meaningful *voir dire* examination. Certainly that is not the intent of this Court as a result of the *Irvin v. Dowd* case. The *Yount* case more closely resembles that which was presented to this Court in *Murphy v. Florida*, 421 U.S. 794 (1975), than that found in *Irvin v. Dowd*, 366 U.S. 717 (1961). The standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), and applied to a State court conviction in *Irvin* clearly are inapplicable to the instant case. *Yount* has failed to establish that there was actual prejudice or that such could be imputed to those persons selected to hear his case. Nine of the jurors were seated with no challenges of any form having been made. The *voir dire* conducted was more than adequate to assure that

those persons who sat on the jury were fair and impartial. Yount has failed to establish that the pre-trial publicity surrounding his case was so extensive that actual prejudice was created.

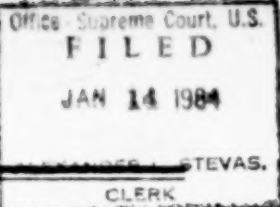
CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be vacated with directions to affirm the judgment of the United States District Court for the Western District of Pennsylvania.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST S. PATTON, Superintendent,
SCI — CAMP HILL, and
HARVEY BARTLE, III, Attorney General
of the Commonwealth of Pennsylvania,
Petitioners,

v.
JON E. YOUNT,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. Whether extensive publicity prior to Yount's retrial repeatedly revealed prejudicial information from his first trial, information not officially in evidence against him at retrial, which so poisoned the general atmosphere of the community that actual juror prejudice resulted, infringing on his ability to select and empanel a fair and impartial jury under the Sixth Amendment and denying due process as prescribed by the Fourteenth Amendment to the Constitution of the United States?

II. Whether a federal court, in reviewing a state court conviction by way of habeas corpus, may, as a result of an independent evaluation of the mixed question of law and fact regarding jurors' opinions, disregard equivocal assurances of impartiality to find that the defendant was denied a fair and impartial jury as prescribed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

III. Whether in reversing Yount's state court conviction, the United States Court of Appeals for the Third Circuit properly applied the standards regarding juror prejudice cited in *Murphy v. Florida*?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	14
ARGUMENT	
I. EXTENSIVE PUBLICITY PRIOR TO YOUNT'S RETRIAL REPEATEDLY REVEALED PREJUDICIAL INFORMATION FROM HIS FIRST TRIAL, INFORMATION NOT OFFICIAL- LY IN EVIDENCE AGAINST HIM AT RETRIAL, WHICH SO POISONED THE GENERAL ATMOSPHERE OF THE COMMU- NITY THAT ACTUAL JUROR PREJUDICE RESULTED, IN- FRINGING ON HIS ABILITY TO SELECT AND EMPANEL A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AMEND- MENT AND DENYING DUE PROCESS AS PRESCRIBED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES	18
A. Introduction	18
B. The Instant Case Exhibits Publicity Preceding Trial So Extensive And Of Such Inflammatory Nature As To Deem That Publicity Inherently Prejudicial	19
C. Difficulty Of Voir Dire Provides Overwhelming Evidence That Community Atmosphere Was Poisoned Against The Accused So As To Im- peach Any Stated Indifference Of His Jurors	21
D. Prejudice Against Yount That Permeated The Voir Dire And The Community Was Reflected In The Twelve Jurors And Two Alternates Ultimately Seated	23

Table of Contents Continued

Page

II. A FEDERAL COURT, IN REVIEWING A STATE COURT CONVICTION BY WAY OF HABEAS CORPUS, MAY, AS A RESULT OF AN INDEPENDENT EVALUATION OF THE MIXED QUESTION OF LAW AND FACT REGARDING JURORS' OPINIONS, DISREGARD EQUIVOCAL ASSURANCES OF IMPARTIALITY TO FIND THAT THE DEFENDANT WAS DENIED A FAIR AND IMPARTIAL JURY AS PRESCRIBED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES	30
III. IN REVERSING YOUNT'S STATE COURT CONVICTION, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE STANDARDS REGARDING JUROR PREJUDICE CITED IN <i>MURPHY V. FLORIDA</i>	34
CONCLUSION	38

TABLE OF AUTHORITIES

CASES:	Page
<i>Beck v. Washington</i> , 369 U.S. 541 (1962)	21, 37
<i>Brown v. Allen</i> , 344 U.S. 443 (1953)	31
<i>Chambers v. Florida</i> , 309 U.S. 227 (1940)	30
<i>Commonwealth v. Yount</i> , 435 Pa. 276 (1969)	5, 20
<i>Commonwealth v. Yount</i> , 455 Pa. 303 (1974) .	7, 12, 28, 32
<i>Cyler v. Sullivan</i> , 446 U.S. 335 (1980)	34
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	<i>passim</i>
<i>Marshall v. United States</i> , 360 U.S. 310 (1959) .	17, 21, 34
<i>Martin v. Warden</i> , 653 F.2d 799 (3d Cir. 1981) <i>cert.</i> <i>denied</i> , 454 U.S. 1151	23, 37
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	5
<i>Murphy v. Florida</i> , 421 U.S. 794 (1975)	<i>passim</i>
<i>Nebraska Press Association v. Stuart</i> , 423 U.S. 1327 (1975)	20
<i>Reynolds v. United States</i> , 98 U.S. 145 (1908)	15
<i>Rideau v. Louisiana</i> , 373 U.S. 723 (1963)	20
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966)	21
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982)	18, 36
<i>Stroble v. California</i> , 343 U.S. 181 (1952)	21
<i>Sumner v. Mata</i> , 449 U.S. 539 (1981)	30
<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965)	32
<i>United States, ex rel., Bloeth v. Denno</i> , 313 F.2d 364 (2d Cir. 1962)	36
<i>United States v. Williams</i> , 568 F.2d 464 (5th Cir. 1978)	20
<i>Yount v. Patton</i> , 537 F.Supp. 873 (W.D.Pa. 1982) ..	12, 37
<i>Yount v. Patton</i> , 710 F.2d 956 (3d Cir. 1983) ..	1, 13, 36-37
RULES:	
Pennsylvania Rules of Criminal Procedure, Rule 1106(d)	28

Table of Authorities Continued

Page

STATUTES:

Title 28, United States Code, Section 1254	1
Title 28, United States Code, Section 2254	12, 15, 31, 33, 34, 35

OTHER:

ABA Standards for Criminal Justice Standard 8-3.5(b) (1982)	26
United States Constitution, Sixth Amendment	2, 14, 18, 19
United States Constitution, Fourteenth Amendment	2, 14, 19

BRIEF FOR THE RESPONDENT

OPINION BELOW

Following conviction, Respondent's direct appeal advanced his claims regarding jury prejudice to the trial court and to the Pennsylvania Supreme Court. The Memorandum of the trial court denying post-trial motions may be found in the Appendix at 262a; the opinion of the Pennsylvania Supreme Court affirming the judgment of sentence is reported at 455 Pa. 303, 314 A.2d 242 (App. 277a).

Upon review of Respondent's Petition for the Writ of Habeas Corpus, United States Magistrate Robert C. Mitchell recommended to the United States District Court that the writ issue. That recommendation may be found in the Appendix at 744a.

Respondent's Petition for the Writ of Habeas Corpus was denied by United States District Judge Donald E. Ziegler, Western District of Pennsylvania. The opinion is reported at 537 F.Supp. 873 (W.D. Pa. 1982) (App. 783a).

The opinion of the United States Court of Appeals for the Third Circuit reversing the order of the district court and ordering that Respondent be retried within a reasonable time or released, is reported at 710 F.2d 956 (3d Cir. 1983) (App. 833a).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Third Circuit were entered May 10, 1983.

The Petition for the Writ of Certiorari was docketed with this Court on June 29, 1983; certiorari was granted on October 17, 1983.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT

On April 28, 1966, the body of Pamela Sue Rimer, an 18-year-old senior at the DuBois Area High School, was found shortly after her death in a sparsely wooded area near her home in Luthersburg, Clearfield County, Pennsylvania. Except for a stocking which was tied loosely around her neck and a shoe which was found under her body, she remained fully clothed. The autopsy revealed no indication that she had been sexually assaulted. Early the following morning, Jon E. Yount, a teacher of the victim, surrendered to the Pennsylvania State Police. He was arrested and charged with murder and rape.

Yount was 28 years old and had generally resided in Clearfield County during that period of time. He had graduated from Pennsylvania State University with a Masters Degree in Education. Married, the father of two small children, and a teacher of chemistry and mathematics for eight years at the DuBois Area High School, he had no prior criminal record. Previously, he had never been the subject of notoriety which would have drawn public attention or focused community prejudice against him.

The parties have stipulated that at the time pertinent to this appeal, rural Clearfield County had a population of 74,619, and that there were two newspapers, the Clearfield Progress (circulation of 16,250) and the DuBois Courier Express (circulation of 9,500), in general circulation within the county. In addition, there were a limited number of radio and television stations of local origin which Yount contends carried the same coverage of the case as did the two newspapers. (App. 407a, 408a, 464a, 478a, 484a).

Daily front page newspaper articles detailed the incident, the backgrounds of Yount and Rimer, the admissions of Yount and the seizure of what police believed were the murder weapons. The article that appeared in the Courier Express on May 3, 1966, contrasts a photograph of the decedent's parents at the burial service with large headlines "POLICE READ YOUNT STATEMENT AT HEARING" (App. 533a, 538a-540a). The statement quoted as being read at the hearing included specific details of the meeting between Yount and Rimer immediately preceding her death, the conversation that took place between them, the fight that occurred, including swinging a wrench at her several times, and his running from the scene of the crime. While three newspapers and one radio station representative covered the hearing, others reported that approximately 150 automobiles combined to form "probably the largest funeral procession in contemporary times" (App. 541a).

Pretrial motions for change of venue and suppression, as well as selection of the jury, were followed closely by the media. The trial commenced on September 28, 1966 in the City of Clearfield, County of Clearfield, Pennsylvania before Judge John Cherry. There was detailed front-page news coverage of the trial. The article on September 30, 1966 repeats statements made by Yount admitting hitting the decedent with a wrench and choking her as well as other details of the slaying. Newspaper coverage continued to repeat statements of Yount, referred to as his "story," that were ultimately suppressed by the Pennsylvania Supreme Court (App. 574a-576a).

The temporary insanity defense in the first trial was covered by the news media in great detail. Psychiatric testimony was presented by the defense that Yount was temporarily insane at the time of the incident. The newspapers reported that "[never before in Clearfield County judicial history has a larger group of medical men been assembled to testify at one trial . . .] this trial now is one of major proportions; and public and professional attention" (App. 611a). The testimony of Yount was reported verbatim in the media, especially as it related to his illnesses, his "brain damage" and as to the incident with the decedent (App. 586a-589a). To counter the testimony of the pathologist called by the Commonwealth, Dr. Cyril Wecht, Chief Forensic Pathologist of Allegheny County's Office of the Coroner in Pittsburgh, testified that the decedent had not been raped (App. 598a-599a).

Interwoven with the factual reporting was the constant reference to the subsequently suppressed statements. For example,

And that is the way it was with much of Yount's testimony during the cross-examination. He wasn't recalling yesterday what he, himself, had written in his own handwriting of his meeting Pamela Sue Rimer on that red-dog road in Brady twp. April 28; or the oral statement he had given the district attorney's, several hours after he voluntarily appeared at the DuBois state police substation (App. 601a).

The reporting strayed far from the facts by such comments as the following,

When quizzed about his handwritten statement and the oral statement, Yount became legalistic, avoiding any assumptions (App. 605a).

Yount testified as to meeting Rimer the day of the killing, fighting with her, having had a wrench in his hand and as to his lack of memory regarding other details. Headlines read: "EMOTION CHARGED TRIAL NEAR CLIMAX" (App. 623a).

A verdict of guilty of rape and murder in the first degree, with punishment set at life imprisonment, was returned by the jury on October 7, 1966. Front-page articles stated that "Courthouse observers had never in contemporary history seen such a large crowd to watch the departure of a convicted man from the courthouse." (App. 638a). Trial publicity culminated in seventeen consecutive editions for each county newspaper bearing banner headlines and multiple featured articles. The Progress adjudged Yount's trial to be the top news item of 1966.

Yount appealed from the judgment of sentence to the Supreme Court of Pennsylvania. In *Commonwealth v. Yount*, 435 Pa. 276 (1969) the court reversed the conviction and ordered a new trial because the written confession admitted into evidence was not preceded by warnings satisfying *Miranda v. Arizona*, 384 U.S. 436 (1966). His appeals had continued to receive detailed front-page coverage. The reversal of his conviction by the Supreme Court brought a new tide of headlines and publicity that included quotations from the majority opinion and a complete quotation of the dissenting opinion (App. 644a).

Yount returned to Clearfield County for retrial before the same judge and in the same courtroom. Pretrial motions for change of venue and for suppression of evidence resulted in hearings conducted by the trial court on June 5, July 29, and August 16, 1970. The court granted in part the motion to suppress but denied the motion for change of venue in a memorandum and order dated September 21, 1970 (App. 259a-261a). These events continued to receive front-page coverage, as well as radio and television review, that included the fact that Yount had been convicted of murder and rape (App. 651a-654a).

On November 4, 1970, jury selection commenced for the second trial of this case. Eleven days, at least six panels of prospective jurors, 1186 pages of testimony, and exhaustion of defendant's preemptory challenges were required to seat

twelve jurors and two alternates. The veracity of veniremen was eroded early in voir dire when graphic evidence of the depth of community sentiment against Yount surfaced in the testimony of Vera K. Krapf, a minister's wife. She admitted a bias against the accused resulting from an apparent conspiracy among members of her church who had attempted to influence her decision if she were chosen as a juror (App. 25a-27a). She was asked:

Q Would your presence in serving as a juror create a difficulty in your parish?

A Why yes—when people heard my name was on for this—countless people of the church have come to me and said they hoped I would take—the stand I would take in case I was called. I have had a prejudice built up from the people in the church.

Q Is this prejudice, has it been adverse to Mr. Yount?

A Yes it was. They all say he had a fair trial and he got a fair sentence. He's lucky he didn't get the chair.

* * *

A [T]o say that I could dismiss all that has been told and felt—and the church people—I haven't asked for any of this but they discuss it in every group—but they say now since you are chosen and you will be there we expect you to follow through—

Q Notwithstanding what the Court would tell you, you feel that you would be subject to the retributions or retaliation of these people—

A I think I would hear about it.

The suspicion that there were many veniremen similarly predisposed, (App. 512a) but who would not admit their bias as readily as Mrs. Krapf, was confirmed by the testimony of Connie Ives, a witness during the November 3, 1981 hearing before the federal magistrate (App. 473a). She testified that her father-in-law, Omar Ives had expressed a strong pretrial bias against Yount. However, Veniremen Ives testified that

he had no opinion (App. 137a, 145a). The defense also learned during a hearing before the trial court to challenge the array of the second panel of veniremen that members of the community had solicited subpoenas from deputy sheriffs to serve on the jury (App. 418a, 498a).

Following the exhaustion of the regular panel of jurors, Yount moved for a change of venue. The trial court denied the motion. Yount moved for a change of venue following the exhaustion of each of the subsequent five panels of jurors. The trial court denied each of these motions. Following a hearing on the motions on November 14, 1970, the trial judge revealed his uncertainty regarding the impartiality of the first ten (actually 11 but one was excused because her sister died) jurors by concluding that:

[A]lmost all, if not all, jurors already seated had no prior or present fixed opinion (App. 264a, 499a, 503a).

Of the 163 veniremen examined during voir dire, 98% remembered the case; over 90% of those asked said they had discussed the case or heard others express their opinions; and 126, or 77%, admitted that they would carry an opinion of Yount's guilt into the jury box. The trial court excused 117 prospective jurors, or 72%, after they testified that they could not set aside their prejudice against Yount. Nine other veniremen, unsuccessfully challenged for cause by Yount, indicated they had an opinion which would change if he could convince them to do so. Yount preemptorily challenged six of those nine, one was seated as a juror and two were seated as alternate jurors. Twelve other veniremen stated that they had an opinion at one time but claimed the ability to dismiss their opinions if selected as jurors. One of those twelve was dismissed for cause, six were preemptorily challenged by Yount, and five were seated as jurors.

Of the twelve jurors and two alternates ultimately empanelled to hear the evidence, all but one were familiar with the case, several explicitly recalled Yount's prior conviction for the same crime or confessions, eight of the fourteen admitted

that they had formed an opinion as to his guilt, and at least four jurors stated that it would take evidence by Yount to overcome their belief.

Juror No. 1, Blair Hoover, said that he had read about the case and heard others express their opinions but had never developed a "true" opinion (App. 32a, 34a, 37a, 38a). Juror No. 2, Clair Clapsaddle, testified that he had recently discussed the case with others and had formed an opinion which could be set aside because "that's the way it's supposed to be." He displayed considerable uncertainty regarding Yount's responsibility to prove his innocence (App. 43a-46a, 49a, 50a). Juror No. 3, John T. Harshak, was familiar with the case through discussion and reading "a few years ago" and wanted to be on the jury (App. 209a, 216a). Juror No. 4 was John Yorke, a recent immigrant to Clearfield County and knew nothing about the case. Juror No. 5, Mary Jane Waple, stated that she "remembered that they said he was guilty before and I didn't understand why they were having another trial" (App. 70a-76a). She denied an opinion and said she would try to forget what she knew.

Juror No. 6, James F. Hrin, testified that he had a "solid" opinion (App. 86a). He was then asked:

- Q Would you be able to change your mind regarding your opinion before becoming a juror in this case. That's the way I must have you answer the question?
- A If the facts were so presented I definitely could change my mind.
- Q Would you say you could enter the jury box presuming him to be innocent?
- A It would be rather difficult for me to answer.
- Q Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the judge?
- A That I could do.

Q Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?

A Definitely. If the facts show a difference from what I had originally been led to believe, I would definitely change my mind.

Q But until you're shown those facts, you would not change your mind—is that your position?

A Well—I have nothing else to go on.

After repeatedly stating that he would need evidence to change his opinion, Juror No. 6 responded "I don't know if that's the answer you want." When asked yet again if he could set his opinion aside, he replied, "I have to." (App. 83a-85a). The court denied Yount's challenge for cause.

Juror No. 7, Martin R. Karetski, testified that he had formed an opinion but that he was uncertain that he still had an opinion or that he could forget what he knew (App. 98a-100a, 113a-114a). This juror became jury foreman. Juror No. 8, Julia C. Hummel, had heard discussions of the case, and had had an opinion (App. 119a, 120a) although she had none at present except "what he had said himself—that he was guilty" (App. 125a). She was uncertain if she would consider what she already knew during deliberations (App. 128a, 129a). Juror No. 9, Jessie M. Parks, said she had thought Yount was guilty and wondered about the necessity for a new trial. She testified that "I could say I am biased" but would have to hear both sides before she could decide (App. 149a-151a).

Juror No. 10, Albert I. Undercoffer, had heard the opinions of others, had expressed his own opinion and had read about the case. Admitting that it would be difficult to forget what he knew about the case and base a verdict solely on evidence presented in the courtroom, he was asked (App. 163a, 165a, 166a):

Q Mr. Undercoffer . . . do you have an opinion as to Mr. Yount's guilt or innocence as of now?

A . . . I think that the court first tried Mr. Yount and then decided he was entitled to a new trial and my opinion is that if the Court says he is then he is. . . . [I] would want him to have every opportunity to prove his innocence. . . .

* * *

Q You want him to prove that?

A Yes (App. 165a).

Robert P. Murphy and Irene Kurtz, Jurors No. 11 and 12, respectively, stated they had read about the case but had no opinions (App. 174a, 176a, 177a, 186a, 190a, 194a). Alternate No. 1, David J. Chincharick, stated that he had an opinion that remained firm and fixed and which could not be put aside until evidence was presented (App. 234a-240a). Alternate No. 2, LaVerne B. Pyott, said that she had a definite opinion which she could not dismiss and which only evidence could change. (App. 250a-252a).

Jurors Harshak and Kurtz (Nos. 3 and 12) and both alternates, Chincharick and Pyott, were seated over Yount's challenges for cause after he had exhausted his preemptory challenges. Although the alternate jurors did not participate in the jury's deliberations, both were sequestered with the jury for four days. They were instructed by the court that they were free to discuss the case with other jurors during sequestration.

The news media continued to deluge the community with front-page prejudicial information throughout the eleven days of voir dire. The selection of each juror merited an article and often a profile. Jurors Nos. 3, 8, 9, 10, 11, 12 and both alternates were selected from panels of veniremen other than the regular panel and were exposed to daily accounts regarding the questioning of veniremen, the difficulty in seating a jury, and Yount's prior conviction (App. 658a-671a, 422a). By the close of voir dire, the two county newspapers had printed 66 front-page articles on the appeals and retrial (App. 633a-670a).

The indictment for rape was quashed. Yount's retrial for murder before the same judge began on November 17, 1970. Verdicts available to the jury were first-degree murder (automatic sentence of life imprisonment), second-degree murder (discretionary sentence of 20 years or less), voluntary manslaughter (discretionary sentence of 12 years or less), and not guilty (App. 757a-758a). The degree of the offense could rise no higher than second-degree unless the prosecution carried its burden of proving the requisite intent to kill. Evidence of provocation or passion could reduce the killing to voluntary manslaughter.

The prosecution presented a substantially different case at retrial. Sexual assault was not an issue. The alleged oral and written confessions of Yount, as well as an alleged weapon (wrench) and bloodstained clothing of the accused, were suppressed. The difference in the defense was even more marked. Yount did not testify nor did he raise the defense of temporary insanity. Instead, he relied solely upon cross-examination and reputation witnesses, in order to seek an acquittal or conviction of a lesser included offense.

Much of the most prejudicial information, especially that related to the issue of "intent," publicized by the news media was never heard from the witness stand at retrial. The three-day trial was concluded on November 20, 1970. The jury found Yount guilty of first-degree murder and he was resentenced to life imprisonment. He is serving the sentence in the custody of Ernest S. Patton, Superintendent of the State Correctional Institution at Camp Hill, Pennsylvania.

Yount's timely post-trial motions alleging, *inter alia*, that the trial court erred in denying a change of venue and several causal challenges, were denied by that court on January 15, 1973 (App. 267a-276a). More than two years after retrial and without the benefit of a post-trial hearing, the trial court held that:

[T]here was practically no publicity given to this matter through the news media . . . [between the first trial and

retrial] except to report that a new trial had been granted by the Supreme Court. . . .

. . . [W]e are satisfied that even where a juror may have had an opinion in the matter, the jury was without prejudice. . . . (App. 268a-269a).

Yount appealed to the Pennsylvania Supreme Court. The judgment of sentence was affirmed. *Commonwealth v. Yount*, 455 Pa. 303 (1974) (App. 277a-293a). The Supreme Court adopted the trial court's post-trial findings noting that:

Neither does the voir dire, as appellant argues, " 'reveal a "clear and convincing" build-up of prejudice or a pattern of deep and bitter prejudice' shown . . . throughout the community" which would require a change of venue. . . .

. . . [T]he record fails to disclose undue community prejudice. *Id.*, 455 Pa. at 312-314 (App. 284a-286a).

Pursuant to Title 28, United States Code, Section 2254, Yount filed a petition for writ of habeas corpus on January 5, 1981 (App. 297a-309a). On April 16, 1981, the Federal Public Defender's Office was appointed to represent Yount. The petition was referred to United States Magistrate Robert C. Mitchell for consideration of the allegation, *inter alia*, that:

12-B. Petitioner's conviction was obtained by a violation of his constitutional right to select and empanel a fair, impartial and "indifferent" petit jury.

Magistrate Mitchell conducted two evidentiary hearings, then issued a report and recommendation in which he recommended the writ be granted because "it does not appear that the Sixth Amendment mandate of a fair and impartial jury could have been met in the small rural community of Clearfield County" (App. 744a, 768a). United States District Judge Donald E. Ziegler rejected the recommendation of the magistrate with regard to contention "12-B," denied Yount's petition for writ of habeas corpus (*Yount v. Patton*, 537 F.Supp. 873 (W.D.Pa. 1982) (App. 783a), and issued an order that a "certificate of probable cause be and hereby is granted" (App. 810a).

Oral arguments for Yount's appeal of the district court's denial of his petition were heard by Judges Hunter, Garth and Stern of the United States Court of Appeals for the Third Circuit on December 17, 1982. In an opinion issued May 10, 1983, the circuit court unanimously held that Yount was denied his right to a fair trial by an impartial jury and ordered that the writ issue unless he was afforded a new trial within a reasonable time. *Yount v. Patton*, 710 F.2d 956 (3d Cir. 1983) (App. 833a). The court explicitly concluded that:

Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County. After examining the totality of circumstances, we hold that petitioner's retrial was not fundamentally fair. *Id.*, 710 F.2d at 972.

The circuit court also found that the trial court had erred in denying several of Yount's challenges for cause. In its independent review, the circuit court found that there were nine veniremen unsuccessfully challenged for cause who had opinions which they could change only if Yount could convince them to do so. One of these nine was seated as a juror and six required the use of Yount's preemptory challenges. *Id.*, 710 F.2d 964, n. 13 (App. 848a). The court then emphasized that:

In fact, as we have noted, the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors. *Id.*, 710 F.2d at 970, n. 24 (App. 863a).

Judge Garth, in a concurring opinion, focused on the trial court's refusal to dismiss a juror with a disqualifying prejudice:

In this case, a juror by his own admission, required the production of evidence to change his preconceived opinion of the defendant's guilt, and agreed to keep an open mind about this evidence if and when he heard it. . . . A defendant cannot constitutionally be convicted by a jury containing one such juror.

* * *

. . . Neither the trial court nor the Pennsylvania Supreme Court, however, considered the legal effect of *Hrin's* [the

juror's] requirement that the defendant put on evidence to disabuse Hrin's [the juror] of his opinion. This latter requirement raises a presumption of partiality as a matter of law . . . *Id.*, 710 F.2d 981 (App. 889a, 890a).

The petition for writ of certiorari was filed with this Honorable Court on June 30, 1983. Certiorari was granted on October 17, 1983.

SUMMARY OF THE ARGUMENT

I. The Sixth and Fourteenth Amendments to the Constitution of the United States form an alliance to mandate federal court review of the protections provided citizens of the United States by the state courts against criminal conviction by a partial jury. The pretrial publicity surrounding the Yount trial infringed on his ability to select and empanel a fair and impartial jury. The publicity disclosed that the jury in the first trial had convicted Yount of murder, it disclosed written confessions, oral statements, and his testimony, and revealed testimony at the first trial of his plea of temporary insanity, and conviction of rape. The widespread dissemination of such extra-record information, while not rendering the jury presumptively prejudiced, poisoned the "general atmosphere of the community" in which Yount was retried. *Murphy v. Florida*, 421 U.S. 794, 802 (1975).

The atmosphere in the community caused actual prejudice in the jurors. Of the prospective jurors, 98% and all but one seated juror had read about the case. More than 90% of those asked had discussed the case or heard others express opinions. Of the veniremen questioned, 84% admitted to an opinion regarding Yount's guilt. None indicated they believed him innocent. Of the twelve jurors and two alternates who were selected, eight stated they had formed an opinion as to Yount's guilt before hearing testimony, and several explicitly recalled his confessions before conviction. The existence of such an opinion in the minds of the jurors raises a presumption of

partiality. *Reynolds v. United States*, 98 U.S. 145, 156-157 (1908); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

Many of the fourteen jurors who heard Yount's case gave ambiguous, equivocal or negative responses when asked if they could forget what they had heard and set their opinions aside. At least four of the fourteen jurors stated they would require Yount to produce evidence to overcome their opinions. Having so stated, these jurors abandoned the presumption of innocence and as a matter of law, their admissions raise a presumption of partiality. A defendant cannot constitutionally be convicted by a jury containing even one such juror. *Irvin v. Dowd*, *supra*, 366 U.S. at 723, *Id.* at 728. In light of the pretrial publicity, the difficulty of voir dire, and the testimony of the jurors selected, despite juror assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County.

II. A factual finding of a state court in challenging a state conviction on a petition for a writ of habeas corpus is presumed to be correct unless it can be established by convincing evidence that the factual finding is erroneous. Title 28, United States Code, Section 2254(d) (1976). The state courts found that excessive pretrial publicity did not prevent a fair trial and that the voir dire did not reveal a clear and convincing build-up of prejudice or a pattern of deep and bitter prejudice shown throughout the community which would require a change of venue. The Third Circuit Court of Appeals made an independent evaluation of the factual findings and determined them to be erroneous.

In determining that the factual findings of the state courts regarding publicity were clearly erroneous, the circuit court noted that the publicity proceeding trial was extensive and had a great potential for prejudice. The court noted that the case was a "cause celebre" in a rural community which had been subjected to a barrage of publicity concerning a sensational murder. *Irvin*, 366 U.S. at 725. The court considered the

nature of the publicity as previously discussed in I of the Summary of the Argument, above, as carrying too great a risk of prejudice to be directly offered as evidence. The court rejected the conclusion of the state court that there was practically no publicity given to the matter between trial and retrial noting that the record contained at least 17 front-page articles during that period of time. The court rejected the finding of the trial judge that there was little talk in public concerning the second trial because of the testimony of veniremen indicating that there had been public discussion of the case. Thus, there was substantial evidence in support of the circuit court's determination that the state court's characterization of the news coverage was erroneous.

In regard to the finding of the state court concerning the community prejudice developed from voir dire, the circuit court held that the nature and strength of a veniremen's opinion is a mixed question of law and fact and must be independently evaluated by the court. *Irvin*, 366 U.S. at 723. The independent examination of the voir dire by the circuit court revealed that 77% of the veniremen questioned admitted that they would carry an opinion into the jury box. 72% of the jurors were excused by the trial court on challenges for cause. Ninety percent of those asked said they had discussed the case or heard others express their opinions. An independent evaluation of the voir dire of the twelve jurors and two alternates revealed that the prejudice permeating the voir dire and the community was reflected in their testimony. All but one of the jurors were familiar with the case, and several explicitly recalled Yount's conviction or confessions or both. Eight had formed opinions of his guilt or innocence. One juror stated it would take evidence to overcome his opinion. There was substantial evidence supporting the independent determination of the circuit court that the finding of the state courts regarding the absence of prejudice established during the voir dire was clearly erroneous.

III. The Third Circuit Court of Appeals in directing that the writ of habeas corpus shall issue specifically held that

Marshall v. United States, 360 U.S. 310, 313 (1959) was inapplicable. The court stated that Yount could not argue he had been denied an impartial jury simply because his jury had read of extra-record facts with a high potential for prejudice unlike a defendant seeking review of his federal conviction. Thus, the court required that actual prejudice be shown under *Murphy v. Florida*, 421 U.S. 794 (1975). Therefore, as indicated in II of the Summary of the Argument, an independent review of the record by the Third Circuit Court of Appeals revealed actual prejudice. The argument of petitioner that *Irvin v. Dowd*, 366 U.S. 717 (1961) is clearly distinguishable, is incorrect and the reliance of the Third Circuit Court of Appeals that the voir dire in this case strongly resembles *Irvin* is well taken. Both the publicity and the voir dire are remarkably similar in nature. The Court of Appeals for the Third Circuit was correct in its finding that actual prejudice existed to such a degree that a fair trial was rendered. Given the pervasive community knowledge of the facts of this case and the prevailing opinion as to Yount's guilt, as well as the strong community hostility towards him, it does not appear that the empanelled jury was "capable and willing to decide the case solely on the evidence before it" but rather at best required him to prove his innocence or at least overcome strong preconceived notions as to his guilt. Under such circumstances, it does not appear that the Sixth Amendment mandate of a fair and impartial jury could have been met in the small rural community of Clearfield County (App. 768a).

ARGUMENT

- I. **EXTENSIVE PUBLICITY PRIOR TO YOUNT'S RETRIAL REPEATEDLY REVEALED PREJUDICIAL INFORMATION FROM HIS FIRST TRIAL, INFORMATION NOT OFFICIALLY IN EVIDENCE AGAINST HIM AT RETRIAL, WHICH SO POISONED THE GENERAL ATMOSPHERE OF THE COMMUNITY THAT ACTUAL JUROR PREJUDICE RESULTED, INFRINGING ON HIS ABILITY TO SELECT AND EMPANEL A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AMENDMENT AND DENYING DUE PROCESS AS PRESCRIBED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.**

A. Introduction

The Sixth Amendment to the Constitution of the United States guarantees to an accused the right to be tried by an "impartial jury." The due process clause of the Fourteenth Amendment requires the states to effectuate that right by providing an accused with a fair trial "by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

The question presented in this case, then, becomes one of whether the trial court, given the pretrial publicity surrounding Yount's arrest, first trial, successful appeals, hearings prior to retrial, and portions of voir dire, as well as evidence of the resulting bias of Clearfield County citizens against the accused elicited during jury selection, applied adequate safeguards to protect Yount's right to a fair trial by impartial and indifferent jurors. These jurors must not only be "willing" to put aside any preconceived opinions regarding a defendant's guilt, but must be "capable" of deciding the case solely on the evidence presented in court. *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Murphy v. Florida*, 421 U.S. 794, 799 (1975). Although many veniremen stated a willingness to lay aside opinions regarding Yount's guilt, these jurors were incapable of doing so in light of the community's sentiment against him. A juror's assurance that he can enter the jury box without an opinion is not dispositive if the accused can demonstrate "the

actual existence of such opinion in the mind of the juror as will raise the presumption of partiality." *Murphy*, 421 U.S. at 800.

The issue in this case does not contrast a First Amendment freedom of the press issue against a Sixth Amendment right of a defendant to a fair and impartial jury (Petitioners' brief, page 11). The issue is not one of the media's right to fairly report the facts surrounding a criminal case, nor the manner in which that information was portrayed. The issue in this case is whether the publicity revealed prejudicial information not in evidence which poisoned the general atmosphere of the community resulting in actual juror prejudice. The resolution of that issue involves a determination of whether Yount received a fair trial by a panel of impartial, indifferent jurors mandated by the Sixth and Fourteenth Amendments. In *Irvin*, 366 U.S. at 725-28, the Court considered the extent and content of the publicity as an indicator of "the then-current community pattern of thought," then reviewed the voir dire for opinions expressed by veniremen and the difficulty in finding prospective jurors who could at least claim impartiality, and finally, examined the testimony of seated jurors for reflections of that community prejudice.

B. The Instant Case Exhibits Publicity Preceding Retrial So Extensive And Of Such Inflammatory Nature As To Deem That Publicity Inherently Prejudicial.

Petitioner concedes that this case received substantial publicity within the Clearfield County area. Petitioner does not suggest that publicity in any significant amount extended beyond the county. Examples of coverage by the two county newspapers demonstrate the extensive nature of the publicity within the county; however, it was the nature of the information revealed by that coverage that was most damaging to Yount (App. 406a, 407a, 452a, 453a, 473a, 474a). These newspaper articles, which received front-page coverage and often banner headlines repeatedly revealed the following concerning Yount: that he had surrendered to the police; that he had been charged with murder and rape; that he had given the police a

written and two oral confessions; that he had led police to a wrench described as the "murder weapon;" that he had relied on the defense of "temporary insanity" complete with the testimony of opposing medical experts regarding "brain damage" and his frame of mind; that he had given an in-court confession; and, most prejudicial, that he had been convicted by a jury of first-degree murder and rape and sentenced to life imprisonment.

The community's collective memory was repeatedly refreshed by front-page reports of his post-trial motions and successful appeal to the Pennsylvania Supreme Court. The lone dissenting opinion of the Chief Justice was published verbatim. *Commonwealth v. Yount*, 435 Pa. 276 (1969) (App. 644a, 762a). Magistrate Mitchell and the United States Court of Appeals for the Third Circuit found that "the publicity was understandably most extensive and most prejudicial before and during (Yount's) first trial . . ." (App. 86a). However, the circuit court also found that the publicity continued in 66 front-page articles in the two county newspapers during the four years between Yount's first trial and the conclusion of voir dire at retrial (App. 847a). Front-page coverage during this time included: "YOUNT IS GUILTY; GIVEN LIFE TERM," "MORE DETAILS OF YOUNT'S JURY DELIBERATION," "YOUNT RULING BRINGS PROPOSED LEGISLATION," "DA REILLY TRYING TO STOP RETRIAL OF SLAYER YOUNT" (App. 630a, 639a, 640a, 645a, 646a).

Few revelations could be so damning to Yount as publicity that the jury had previously convicted him of the murder, as well as the rape, (App. 406a, 407a, 452a, 453a, 473a, 474a) of the decedent, *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978), except, possibly, the disclosure of Yount's written confessions and his in-court testimony. See *Nebraska Press Association v. Stuart*, 423 U.S. 1327 (1975) (on reapplication for stay); *Rideau v. Louisiana*, 373 U.S. 723 (1963). Yount did not testify at retrial. His written confessions were suppressed. The two brief oral statements admitted at retrial did not convey the prejudicial information of the written

confessions or trial testimony. See *Stroble v. California*, 343 U.S. 181, 195 (1952). This highly inflammatory information was too inherently prejudicial to be put into evidence, *Marshall v. United States*, 360 U.S. 310, 312-13; "the exclusion of such evidence in court is meaningless when the news media makes it available to the public." *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966); *Murphy*, 421 U.S. at 802. Any subsequent court proceedings in a community so pervasively exposed to such a degree of prejudicial information could be but a hollow formality.

C. Difficulty Of Voir Dire Provides Overwhelming Evidence That Community Atmosphere Was Poisoned Against The Accused So As To Impeach Any Stated Indifference Of His Jurors.

Here, as in *Irvin*, a "cause celebre" case in a rural community, barraged by publicity regarding a sensational slaying, impartial jurors were hard to find. *Irvin*, 366 U.S. at 727. Although four years had elapsed between trials, voir dire revealed that more than 98% of the veniremen questioned remembered the case and over 90% of those asked said that they had discussed the case or heard others express opinions. Many veniremen volunteered that they believed Yount to be guilty. None said he was not guilty. The passage of time may work to erase highly prejudicial publicity from the community's memory, *Murphy*, 421 U.S. at 802; *Beck v. Washington*, 369 U.S. 541, 556 (1962). However, in this case, repeated community exposure kept fresh the imprint of the case in the minds of the public. Veniremen indicated during voir dire that extensive public discussion of the case had occurred, especially in the last weeks before retrial. The United States magistrate found "a strong community hostility toward (Yount)" and a "pervasive community knowledge of the facts of this case" (App. 768a).

Voir dire took eleven days, (App. 669a, 670a) 1186 pages of testimony, at least six panels of veniremen, and exhausted Yount's preemptory challenges. Of 163 prospective jurors

questioned, 126 or 77%, admitted they would carry an opinion of Yount's guilt into the jury box; 117 of those 126 veniremen were excused for cause by the trial court because they could not set aside their opinions. Twelve others admitted to an opinion they believed they could disregard. Thus, more than 84% of those examined admitted to an opinion regarding Yount's guilt. In *Irvin*, 366 U.S. at 727, the Court found that almost 90% of those asked entertained some opinion as to guilt and "readily found actual prejudice against the petitioner to a degree that rendered a fair trial impossible." *Murphy*, 421 U.S. at 798.

Other indications of deep and bitter prejudice against the accused were revealed during voir dire. A minister's wife testified that she had formed an opinion adverse to the accused because of opinions she had heard discussed over the years in church groups and stores, and that church members had attempted to persuade her to vote for conviction if she became a juror. A deputy sheriff told of citizens soliciting subpoenas for jury duty. Evidence produced at an evidentiary hearing before the federal magistrate confirmed Yount's belief during jury selection that potential jurors have veiled strong feelings against him during voir dire.

Confronted with such explicit evidence of deep community bias, the trial court's reluctance to grant casual challenges and refusal to change venue, (App. 731a) and with but 20 preemptory challenges to exercise, it became incumbent upon Yount to attempt to select the jurors least biased and prejudicial against him (App. 497a). Of most concern was the incredulous testimony of veniremen who claimed no knowledge of the case (App. 512a) or who could give blanket assurances of impartiality (App. 866a). When so many jurors admit prejudice, the assurances of the remainder that they are impartial may be realistically rejected. *Irvin*, 366 U.S. at 728. "It is more probable that they are part of a community deeply hostile to the accused and more likely they may unwittingly have been influenced by it." *Murphy*, 421 U.S. at 800.

Therefore, Yount attempted to preserve his preemptory challenges for those veniremen whose testimony was unbelievable. Although preemptory challenges are not intended to correct erroneous decisions by the trial court, too often Yount was required to use them on veniremen who admitted to disqualifying prejudices but who survived challenges for cause. The circuit could find that Yount used twelve preemptory challenges to avoid veniremen who testified to opinions of his guilt (App. 849a, n. 13, n. 14; App. 863a, n. 24). Twenty preemptory challenges become meager, indeed, when 60% of them are required to eliminate admittedly biased jurors, leaving only eight challenges with which to defend against veniremen that he perceived to be less than truthful in the voir dire testimony.

Voir dire in this case strongly resembled that of *Irvin*. The opinions expressed by potential jurors and the difficulty in finding veniremen who could at least claim impartiality demonstrate a pattern of deep and bitter prejudice within the community. Even the trial judge admitted during the hearing before Magistrate Mitchell that "I recall there was a lot of comment, feeling against him . . . after he was sent to prison." (App. 711a). Yount asserts he has shown that "the publicity has been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible." *Murphy*, 421 U.S. at 797; *Martin v. Warden*, 653 F.2d 799, 805 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151.

D. Prejudice Against Yount That Permeated The Voir Dire And The Community Was Reflected In The Twelve Jurors And Two Alternates Ultimately Seated.

In determining whether a fair and impartial jury has been accorded, a distinction is to be made "between mere familiarity with the (accused) or his past and an actual predisposition against him." *Murphy*, 421 U.S. at 800, n. 4. It should be noted at this point that Yount, unlike *Murphy*, did not have a history that called community attention to himself.

Yount's attorney at the retrial testified before Magistrate Mitchell that the defense strategy had changed by the time of the second trial, because of the drastic difference in the state's case, in order to seek an acquittal or conviction of a lesser included offense (App. 430a). At the time of his retrial, the possible verdicts available to the jury were first-degree murder, second-degree murder, voluntary manslaughter and not guilty.

To obtain a verdict of first degree-murder, the prosecution was required to prove it was willful, deliberate and premeditated. Second-degree murder included any unlawful killing where there was no intention to kill. Voluntary manslaughter consisted of an intentional act and unlawful killing without malice, committed under the influence of sudden passion.

Both the prosecution and defense changed dramatically in the second trial. Yount's written and most of his oral statements were suppressed. The wrench and all references to it were suppressed. The bloody clothing of Yount was suppressed. Yount was not accused of rape.

The change in the defense was just as dramatic. An insanity defense was not presented as in the first trial. Yount did not testify. Friends, relatives, neighbors, and teachers who worked with him, testified as to his excellent character and reputation in the community.

No evidence was presented that would indicate that the intent was formed prior to the meeting of Yount and Rimer on the date of the incident. The evidence placed a man fitting Yount's description at the scene for a short period of time, perhaps as short as five minutes. No murder weapon was identified. A man fitting Yount's description was observed driving from the scene in an erratic and weaving fashion.

Jurors were called upon to evaluate the circumstantial evidence presented by the Commonwealth to determine whether willful, deliberate and premeditated intent had been proven beyond a reasonable doubt. The application of the law to the facts required an objective analysis by fair and impartial jurors

to effect a fair trial. Had the Commonwealth proved beyond a reasonable doubt a willful, intentional and premeditated murder? Was there no intent to kill because of the shortness of time and lack of evidence of premeditation? These were questions the jury had to resolve.

On the other hand, the jury had to apply the presumption of innocence. Furthermore, that presumption had to be considered along with the evidence of Yount's good character and reputation. Given the brevity of time for confrontation with the victim, testimony that she could have lived for up to 30 minutes following the infliction of the wound, the ferocity of the attack, and the speedy surrender of Yount, the jury could have found a sudden crime of passion rather than a premeditated intent to kill.

The evaluation of these facts and the application of the law required impartial determination to result in a fair trial. Juror Hrin performed this function having formed an opinion from what "was written up in the papers . . ." (App. 83a). Of course, what was in the papers included the prior conviction for rape and murder as well as the suppressed evidence and other testimony not before this jury. Hrin testified before he could change that opinion he "definitely" would "require evidence" that would "show a difference from what I had originally had been led to believe . . ." (App. 85a) When asked whether he could enter the jury box presuming Yount innocent he replied, "[I]t would be rather difficult for me to answer" (App. 84a). With the reliance on character evidence, it is difficult to imagine how Hrin could have set aside his opinion; how he could have concluded that he had been shown a difference from what he had originally believed. Is it reasonable to assume that a juror that would require Yount to produce evidence to change his opinion would first require the Commonwealth to prove Yount guilty of first-degree murder beyond a reasonable doubt? While Juror Hrin presents the clearest example of juror bias, it is only a single example of the prejudice to Yount caused by the circumstances of those jurors who read, heard, discussed and formed opinions. These were the jurors who not

only determined the issue of guilt or innocence, but also the degree of guilt.

Here, all but one of the fourteen seated jurors were familiar with the case. Several explicitly recalled Yount's confessions or conviction for the same offense.

A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind. *ABA Standards for Criminal Justice*, Standard 8-3.5(b) (1982).

Eight jurors admitted that they had formed opinions as to his guilt before hearing testimony. In a community deluged by publicity and public discussion regarding Yount's prior conviction for the first-degree murder and rape of the decedent, his detailed oral and written confessions and testimony, his defense of temporary insanity, and where 77% of those called admitted to a disqualifying prejudice, requests that jurors put their preconceived impressions and opinions aside took insufficient account of the frailties of human nature. *Irvin*, 366 U.S. at 728. The circuit court found that the trial court could have found that a fair trial was impossible in Clearfield County not because of a particular juror but regardless of particular jurors (App. 866a, n. 27). Implicit approval of challenging jurors in this manner is evident in that neither the trial court (App. 262a-269a) nor the Pennsylvania Supreme Court (App. 284a-286a) found any relevance in Yount's failure to make specific causal challenges of nine jurors. Judge Stern, concurring in the opinion of the court of appeals, stated that:

... even if such self-imposed amnesia is possible as a cognitive event, surely its prediction is not reliable—that is, we cannot expect a person to know with any degree of accuracy at the time of voir dire whether or not he will be able to lay aside an opinion, however desirous he is of achieving that end (App. 869a).

It is not surprising that when asked whether they could forget what they had heard and set their opinions aside, many of the jurors gave ambiguous, equivocal or negative responses. Theirs was a "community bias" as well as an individual one (App. 473a, 474a). "The influence of an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin*, 366 U.S. at 727. A juror, though willing to disregard prejudice, is more likely incapable of doing so when that impression or opinion is nurtured and reenforced by three-quarters of his peers. Yount's jurors had abandoned the basic principles of a fundamentally fair trial. It is highly unlikely such biased jurors would presume Yount innocent or require the Commonwealth to sustain its high burden of proving guilt beyond a reasonable doubt. Magistrate Mitchell determined that the empaneled jury was incapable of deciding the case solely on the evidence before it "but rather at best required the (accused) to prove his innocence or at least overcome strong, preconceived notions of his guilt" (App. at 768a).

The court of appeals noted that "even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went 'so far as to say that it would take evidence to overcome their belief' " (App. 866a). Jurors No. 3, 6, (Hrin), 12 and both alternates, were challenged for cause, all but Hrin following exhaustion of Yount's preemptory challenges. In this case, challenges for cause of potential jurors were resolved by the trial court in the presence of the challenged veniremen. The tempering effect on the juror's responses after being questioned by the trial court, defense counsel and the prosecutor is evidenced in the testimony of Juror Hrin. Because of the inflammatory nature of this confrontation between veniremen and the defendant regarding their abilities as jurors, Yount was reluctant to challenge for cause veniremen on whom he felt he could not afford to use preemptory challenges (App. 424a). As noted previously, the defense was forced to apply twelve of its twenty preemptory challenges to veniremen who admitted to harboring opinions adverse to Yount.

Although he did not directly challenge nine of the jurors empaneled to hear this case, Yount challenged jurors as groups at least six times when he moved for a change of venue on the basis that it was impossible to empanel impartial jurors in Clearfield County (App. 417a, 419a, 694a, 716a, 717a). Pennsylvania law at the time of retrial required only that objections be made before the jury retired to deliberate, Pennsylvania Rules of Criminal Procedure, Rule 1106(d) (App. 866a-867a). He challenged the partiality of the jurors after seating Jurors No. 1, 2 and 4; he twice challenged after Jurors No. 5, 6 and 7 were added to the panel. Another challenge occurred after the seating of Jurors No. 8 and 9 and again following the addition of Jurors No. 10, 11 and 12. By that time Yount had exhausted his preemptory challenges. Finally, the defense challenged again by moving for a change of venue after the seating of Juror No. 3 and both alternates. Yount did not wait a number of years, as asserted by petitioner, to challenge the partiality of his jurors. The trial court could have dismissed any of those jurors at that time if it determined, during the resolution of the motions for change of venue that Yount's claim of juror partiality was valid.

Yount did specifically challenge Juror Hrin and the two alternates for cause. He pursued this issue in post-trial motions and direct appeal to the Pennsylvania Supreme Court. The latter concluded that "none of the jurors had a fixed opinion as to (Yount's) guilt or innocence." *Commonwealth v. Yount*, 455 Pa. 303, 314 (1974). This allegation was included in his petition for writ of habeas corpus (App. 300a-303a) and was argued and briefed before the lower courts.

The circuit court explicitly found that at least one of Yount's jurors at retrial admitted to a disqualifying prejudice:

[A]s we have noted, the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors. (App. 863a, n. 24)

Judge Hunter concluded:

There were . . . veniremen, unsuccessfully challenged for cause by petitioner (Yount), who indicated that they

had an opinion which they could change only if the petitioner [Yount] could convince them to do so (App. 848a).

* * *

Petitioner [Yount] preemptorily challenged six of those . . . veniremen, one was seated as a juror, and the remaining two were seated as alternates. . . . (App. 848a, n. 13).

Judge Garth, concurring, found that Juror Hrin:

[B]y his own admission, required the production of evidence to change his preconceived opinion of the defendant's guilt, and agreed to keep an open mind about this evidence if and when he heard it (App. 889a).

Yount asserts that the totality of circumstances, in light of extensive pretrial publicity, difficulty of voir dire, adverse community sentiment and the reflection of that sentiment in the testimony of the fourteen jurors who heard the evidence presented in court, demonstrates that despite their often equivocal assurances of impartiality, the jurors were incapable of setting aside their opinions and rendering a verdict based solely on that evidence. Although the trial court sequestered the jury, "sequestered" potential jurors, admonished each of the six panels of veniremen not to read about or discuss the case, and permitted a relatively wide latitude during voir dire examination, the combination of these measures was ineffective in neutralizing prejudicial pretrial publicity. This is especially true absent a liberal granting of causal challenges. The collective prejudice of the fourteen jurors finally chosen illustrates that nothing less than a change of venue would have protected Yount's right to a fundamentally fair trial.

II. A FEDERAL COURT, IN REVIEWING A STATE COURT CONVICTION BY WAY OF HABEAS CORPUS, MAY, AS A RESULT OF AN INDEPENDENT EVALUATION OF THE MIXED QUESTION OF LAW AND FACT REGARDING JURORS' OPINIONS, DISREGARD EQUIVOCAL ASSURANCES OF IMPARTIALITY TO FIND THAT THE DEFENDANT WAS DENIED A FAIR AND IMPARTIAL JURY AS PRESCRIBED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

No one is to forfeit his liberty as criminal punishment until he has been fairly tried in a public tribunal, free of prejudice and passion. *Chambers v. Florida*, 309 U.S. 227, 236 (1940). The Sixth Amendment guarantees to a criminal defendant the right to a trial "by an impartial jury" in the state in which the crime was committed. The Fourteenth Amendment further provides that the state shall not abridge that right to an impartial jury or deny liberty without due process of law. The combination of these guarantees leads to the corollary that the federal courts have a specific mandate to supervise the state courts' selection of juries and jurors. This Court has held that the questions involved in evaluating jury selection are of both law and fact. *Irvin*, 366 U.S. at 723.

Petitioner's heavy reliance on *Sumner v. Mata*, 449 U.S. 539 (1981), and Title 28, United States Code, Section 2254(d), which require that a state court determination after a hearing on the merits of a "factual issue . . . shall be presumed to be correct," is misplaced. In addition, there is little conflict concerning the relevant facts in this case. There is no dispute that pretrial publicity was extensive in Clearfield County. There is no significant debate regarding the accuracy or the content of that publicity; in fact, it was the relative accuracy of coverage of Yount's arrest, confessions, in-court testimony, insanity defense, conviction of murder and rape, appeals, and retrial voir dire that created the difficulty in jury selection, especially in a rural area. The voir dire reveals the following facts; the trial court's excusal for cause of 72% of the veniremen, the

revelations of community sentiment against Yount, public discussions and publicity regarding the case, and public knowledge of facts not in evidence at retrial. Yount's repeated motions for change of venue, the number of panels of potential jurors questioned, and the prospective and seated jurors to whom casual or preemptory challenges were applied are uncontested facts.

Although the court of appeals, specifically citing Title 28, United States Code, Section 2254(d), did dispute the factual findings of the trial court regarding the amount of publicity between trials (App. 861a, n. 21) and public discussion in the weeks prior to retrial (App. 861a, n. 22), the conflict in this appeal centers around whether the publicity was so inflammatory, the community atmosphere so poisoned, the jury so predisposed to convict, and certain jurors were so prejudiced that Yount was denied an impartial jury. The issues presented to the federal courts in the instant case require the application of constitutional principles to the facts, for the most part, as found. The duty for such adjudications lie with the federal courts, *Brown v. Allen*, 344 U.S. 443, 507 (1953), which must independently evaluate the voir dire testimony of potential and empaneled jurors. *Irvin*, 366 U.S. at 723.

The trial court did not consider the legal effect of evidence of community and juror prejudice elicited during voir dire. The trial court denied a subsequent motion for change of venue following the seating of the first ten jurors and the exhaustion of five panels of veniremen. With no indication that he reviewed the testimony elicited during voir dire to that point, the state court concluded, "almost all, if not all, jurors already seated had no prior or present fixed opinion." Apparently preoccupied with conserving "time and money" the trial judge again did not consider the legal implications of a trial by jury which he could not unequivocally declare free of disqualifying bias. The state fact-finder, absent a post-trial hearing, denied Yount's post-trial motions without providing an indication of the standards applied other than it had "satisfied all requirements of the Pennsylvania Rules of Criminal Procedure" to

determine that the trial court "perceived no bias or prejudice" and that "the jury was without prejudice" (App. 268a, 269a). The court of appeals properly conducted an independent evaluation of the mixed question of fact and law regarding the question of jury and juror impartiality (App. 859a, n. 20), concluded that the widespread dissemination of prejudicial information from his first trial had poisoned the general atmosphere of the community (App. 862a), and rejected the trial court's finding that the jury was without prejudice (App. 865a, n. 26).

The trial court found that Juror Hrin entered the jury box with a "solid opinion" adverse to Yount. However, the Pennsylvania Supreme Court concluded that "none of the jurors had a fixed opinion." *Yount*, 455 Pa. at 314. Neither state court considered the legal effect of this juror's requirement that Yount produce evidence to overcome his "solid opinion." The circuit court found that Hrin, unsuccessfully challenged for cause by Yount, had expressed a disqualifying prejudice (App. 863a, n. 24). Judge Garth, concurring, concluded that as a matter of law, Hrin's testimony raised a presumption of partiality under *Irvin* (App. 887a).

Likewise, the state courts did not consider the legal effect upon Yount's right to an impartial jury of the two alternates who admitted they would, like Hrin, require him to produce evidence to overcome their opinions of his guilt (App. 853a). Although these alternates did not participate in the jury's formal deliberations, they were seated and sequestered for four days with the twelve jurors who finally rendered the verdict of first-degree murder. The jurors were instructed by the trial court that they could discuss the case among themselves while sequestered. The circuit court found that:

[S]uch a sustained condition of "continuous and intimate association" operates to subvert the requirement that the jury's verdict be based on evidence developed from the witness stand. See *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (App. 865a, n. 25).

Petitioner's brief contains several errors with regard to its criticism of the factual determinations of the court of appeals (pages 30-31). First the Commonwealth fails to cite Judge Hunter's reference to Title 28, United States Code, Section 2254(d) found in footnote 20 of his opinion (App. 859a), where the circuit court established the basis for review in this case.

Secondly, the finding by the court of appeals that 66 front-page articles reported the facts of this case between the conclusion of the first trial and the conclusion of voir dire at retrial is not only correct but also the most relevant factual finding regarding then-current publicity that reached the jurors. It is important to note that only six of the final fourteen jurors were selected from the regular panel of veniremen. The remaining eight jurors were selected from the fourth, fifth, and sixth panels of prospective jurors, all of whom had ample opportunity for exposure to all but a few of those 66 articles. (No jurors were selected from the second and third panels of potential jurors called.) These eight jurors were repeatedly exposed to the highly inflammatory information that Yount was again being tried for murder and rape, that there was great difficulty in selecting a jury, and that most jurors were expressing strong opinions of his guilt. (App. at 658a, 670a, 703a). Four of these jurors were selected on November 16, 1970, the final day of voir dire!

Also, the court of appeals did not *assume* that much public discussion about this case occurred just prior to retrial. The court was relying on specific testimony elicited from potential jurors who were a cross-representation of the community (App. 861a, n. 22). The nature of the articles referred to in the preceding paragraph lends credence to the circuit court's finding. In contrast, the conclusion of the trial court, "as far as this Court can recall there has been little if any talk in public," was a personal observation negated by the testimony of many veniremen (App. 264a) and later contradicted by the trial judge himself (App. 711a).

Finally, petitioner erroneously asserts that state court findings: 1) that there was no indication whatsoever that pretrial

publicity had caused prejudice to Yount such that a fair and impartial jury could not be selected; and, 2) that voir dire did not reveal a pattern of deep and bitter prejudice which would require a change of venue; are factual findings to be held presumptively correct under Title 28, United States Code, Section 2254(d). These are mixed questions of law and fact. *See also, Cyler v. Sullivan*, 446 U.S. 335, 341 (1980). (A determination of whether counsel undertook multiple representation is not a finding of fact.)

The court of appeals made a specific finding that Yount had established by convincing evidence that particular factual determinations of the state courts were not fairly supported by the record. Judge Hunter, writing for the court, found that many of Yount's jurors gave equivocal answers when asked if they could set their opinions of his guilt aside (App. 866a). The circuit court properly rejected those uncertain and equivocal statements of impartiality "where, so many, so many times, admitted prejudice." *Irvin*, 366 U.S. at 728. The court then concluded that the totality of the circumstances surrounding the empaneling of the jury, as a matter of law, demonstrated actual prejudice to a degree denying Yount a fundamentally fair trial.

III. IN REVERSING YOUNT'S STATE COURT CONVICTION, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE STANDARDS REGARDING JUROR PREJUDICE CITED IN *MURPHY v. FLORIDA*.

Marshall v. United States, 360 U.S. 310 (1959) has no application beyond the supervision of federal trials. *Murphy*, 421 U.S. a 798. The Court of Appeals for the Third Circuit agreed, stating:

The petitioner challenging his state court conviction in a habeas corpus proceeding must shoulder a particularly heavy burden. Unlike a defendant seeking review of his federal conviction, the petitioner cannot argue that simply because his jury has read of extra-record facts with a high

potential for prejudice, a federal court must presume that the jury was prejudiced . . . Petitioner [Yount] must therefore show "that the publicity has been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible" (App. 858a).

Thus, the curciut court established the standard by which it would review Yount's petition, explicitly rejecting *Marshall* in lieu of the more stringent standards of *Irvin*, *Murphy*, and Title 28, United States Code, Section 2254(d).

Murphy was tried in a densely populated urban area, a fact mirrored in the low percentage of veniremen adversely affected by pretrial publicity. Very little about the instant case resembles *Murphy* except the underlying issue of juror impartiality. Petitioner asserts that *Irvin* is "wholly inapplicable" to this case. However, each case involves a sensationalized homicide in a rural community that was barraged by prejudicial publicity disseminating inflammatory information (App. 473a, 474a). Reports of Yount's "prior" conviction for the same offense, his conviction of the "related charge" of rape, his oral and written confessions, his in-court admissions, and his insanity defense could be deemed no less prejudicial than media reports of *Irvin*'s alleged involvement in other homicides and burglaries, identification, prior record, confession and offer of a guilty plea. As in *Irvin*, much of the information reported in Yount's case would not be disclosed from the witness stand at retrial.

The similarities do not end there. The difficulty in seating a jury, the evidence elicited during voir dire of strong community sentiment, the percentage of community representatives who would admit to an opinion of the defendant's guilt, and the reflection of the foregoing in the opinions of seated jurors are equivalent. The most significant similarity between these cases is the almost 90% and 84% proportion of the prospective jurors who expressed opinions regarding the defendants' guilt, as did more than half of the seated jurors in each case. It becomes apparent that where, as here, there were so few that had not formed an opinion, the inquiry of voir dire merely

became one of whether the juror could lay aside his impression or opinion and render a verdict based on the evidence presented in Court. No measure of protection of the defendant's right to an impartial jury less than a change of venue would be adequate under such circumstances. See *United States ex rel., Bloeth v. Denno*, 313 F.2d 364, 368-369 (2d Cir. 1962).

In all but such cases, an adequate voir dire may suffice to ensure an impartial jury. However, in *Irvin*, as here, where the community was so prejudiced against the defendant, the most properly conducted voir dire could not ferret out all of the hidden prejudices that were the product of that community sentiment. If a juror honestly, but mistakenly, believes that he can remain impartial throughout a trial, no amount of questioning will lead to an admission of prejudice. Rather, the juror will vehemently deny any accusations of bias. *Smith v. Phillips*, 455 U.S. 209, 224 (1982) (dissenting opinion).

Recognizing that many factors influence the responses of prospective jurors during voir dire, the message of this Court has been that community prejudice against an accused may reach a point at which jurors cannot distinguish their bias from that of community sentiment, and, therefore, are incapable of disregarding that bias. *Irvin*, 366 U.S. at 728; *Murphy*, 421 U.S. at 802-803. This Court in these cases has explicitly held that voir dire may be used to impeach the asserted indifference of jurors (App. 737a, 738a).

An 84% proportion of a community prejudiced by pretrial publicity is beyond the influence of "statistical juggling." The federal magistrate and court of appeals properly gave considerable weight to this reliable indicator of community sentiment. The circuit court found that, under the totality of circumstances, such overwhelming evidence of bitter community prejudice, when reflected in the opinions of seated jurors, was constitutionally unacceptable for jury selection.

The district court, although stating "these percentages are not remarkable to anyone familiar with the difficulty of selecting a homicide jury in Pennsylvania," *Yount v. Patton*, 537

F.Supp. 873, 882, did not cite a Pennsylvania or federal case to support such a conclusion. Few Pennsylvania cases have been surrounded by publicity as extensive as that related to the Yablonski murder cases; however, that publicity was reflected in only 23 of 81 (28%) jurors who expressed opinion (App. 864a). *Martin v. Warden*, 653 F.2d 799 (3d Cir. 1981), *cert denied* 454 U.S. 1151. Most relevant is that little difficulty was evident in the selection of a jury for Yount's first trial for the same offense in the same community; it required two days (App. 557a, 558a, 727a, 734a). Yount believes that at 84% and 90%, respectively, the instant case and *Irvin* stand far above the usual cases heard on appeal: *Murphy*, 421 U.S. at 803 (26%); *Beck*, 359 U.S. at 556 (25%); *Martin*, 653 F.2d at 806 (30%). The trial judge observing voir dire would easily recognize such evidence of prejudice without resorting to calculations or percentages. To give substantial weight to such relevant indications of juror prejudice would in no way threaten the voir dire system.

Yount has not challenged the latitude permitted by the trial court in examining veniremen during voir dire; however, such latitude in this case is meaningless if not accompanied by a liberal granting of causal challenges to eliminate any possible jury bias. The court of appeals found that the trial judge was not liberal in using his authority to dispose of veniremen with admitted opinions adverse to the accused. Judge Hunter noted that "each of the 117 veniremen dismissed for cause by the trial court had expressed a disqualifying prejudice which required dismissal." He went on to note that "the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors" (App. 863a, n. 24). In addition, the court found that "twelve other veniremen state that they had an opinion at one time but claimed they would not carry it into the jury box . . . five were seated as jurors." (App. 849a, n. 14).

The instant case will turn on its own facts and merits. Generalizations are unnecessary to find constitutional error.

Judge Stern, concurring with the circuit court's holding, asserted that:

Under any test reflecting even the most minimal respect for the values embodied in the sixth amendment, we would be compelled to invalidate this conviction (App. 869a).

Ultimately, the controlling question is whether the jurors who decided the case were capable of reaching a fair verdict based solely on the evidence presented in court under the totality of circumstances considering the prejudicial publicity, the adverse community sentiment reflected in voir dire, and the testimony of the jurors selected. The record supports the conclusions of the circuit court that despite assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence. Under these circumstances the retrial of Yount was not fundamentally fair.

CONCLUSION

The United States Court of Appeals for the Third Circuit found that Yount had shown that the pre-retrial publicity caused actual prejudice in Clearfield County to a degree rendering a fair trial impossible and that his jury included at least one juror whose disqualifying testimony raised a presumption of partiality. After examining the totality of circumstances, the court of appeals concluded that Yount's trial was not fundamentally fair.

The decision of the United States Court of Appeals for the Third Circuit, that a writ of habeas corpus shall issue unless the

Commonwealth of Pennsylvania affords Yount a new trial,
should be affirmed.

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Assistant Federal Public Defender

No. 83-95-CFH
Status: GRANTED

Title: Ernest S. Patton, Superintendent, SCI - Camp Hill
and LeRoy S. Zimmerman, Attorney General of
Pennsylvania, Petitioners
v.
Jon E. Yount

Docketed:
June 29, 1983

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Bell, III, F. Cortez

Counsel for respondent: Schumacher, George E.

Entry	Date	Note	Proceedings and Orders
1	Jun 29 1983	G	Petition for writ of certiorari filed.
2	Aug 13 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	Aug 17 1983		DISTIBUTED. September 26, 1983
4	Aug 13 1983	X	Brief of respondent Jon E. Yount in opposition filed.
6	Oct 11 1983		REDISTRIBUTED. October 14, 1983
7	Oct 17 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Oct 17 1983		Petition GRANTED.
9	Oct 31 1983	G	Motion of respondent for appointment of counsel filed.
10	Nov 7 1983		DISTIBUTED. November 11, 1983. (Motion of respondent for appointment of counsel).
11	Nov 14 1983		Motion for appointment of counsel GRANTED and it is ordered that George E. Schumacher, Esquire, of Pittsburgh, Pennsylvania, is appointed to serve as counsel for the respondent in this case.
13	Nov 18 1983		Order extending time to file brief of petitioner on the merits until December 15, 1983.
14	Dec 16 1983		Brief of petitioners Patton, Supt., et al. filed.
15	Dec 16 1983		Joint appendix filed.
16	Jan 6 1984		Record filed.
17	Jan 6 1984		Certified original record, 3 sealed envelopes & partial C.A. proceedings, 2 boxes, recieved.
18	Jan 9 1984		SET FOR ARGUMENT. Tuesday, February 28, 1984. (4th case)
19	Jan 14 1984		Brief of respondent Jon E. Yount filed.
20	Jan 25 1984		CIRCULATED.
21	Feb 7 1984		Record filed.
22	Feb 7 1984		Certified copy of partial proceedings & 2 volumes of apperdictes received.
23	Oct 8 1983		Application for bail filed, and order denying same by Brennan, J., on 10/11/83.
24	Feb 28 1984		ARGUED.